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PRIVATE MONITORING OF GATEKEEPERS: THE CASE OF IMMIGRATION ENFORCEMENT

Jeffrey Manns*

Abstract: This article shows how the enlistment of private monitors can overcome the limits of public enforcers in overseeing gatekeeper compliance with liability-induced duties. Gatekeepers are private actors who possess skills or advantages that allow them to detect and prevent wrongdoing in a more cost-effective way than the state. The problem enforcers face is that the same skills or advantages that equip gatekeepers with the ability to identify wrongdoing often provide them with the means and incentives to subvert their duties and to evade public oversight. Policymakers have largely attempted to remedy this challenge by increasing sanctions against gatekeepers and have ignored the potential for heightened monitoring of compliance. This article shows how governments may overcome their inability to oversee gatekeepers by providing private actors, such as victims, qui tam litigants, informants, or even the targeted wrongdoers, with incentives to monitor gatekeeper compliance.

This article puts this private monitoring approach to the test by showing how private monitoring of gatekeepers can redress the chronic failure of efforts to enlist employers as verifiers of employees' immigration status. It suggests that the most effective way to induce employer compliance is to divide the interests of undocumented aliens from employers by offering undocumented aliens immunity and temporary worker status in exchange for reporting their illegal employment. This decentralized, de facto sting operation would make large-scale amnesty serve a productive enforcement purpose. The article also suggests how competitors may serve a similar function as in anti-trust law by serving as qui tam litigants who are empowered to prosecute wayward competitors.

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INTRODUCTION

Recent corporate scandals and failures in other areas such as immigration and drug enforcement have highlighted the limitations of public oversight and the critical role private gatekeepers may play in filling gaps in public enforcement.¹ The desirability of private gatekeepers turns on the fact that the goods or services they supply or demand provide them with cost-effective opportunities to detect and potentially prevent wrongdoing by customers or suppliers. For example, lawyers and accountants may be well-positioned to detect fraud by their clients, employers can confirm the immigration status of job applicants, and internet service providers and search engines can identify and block access to illegal gambling or child pornography web-sites at significantly lower economic and social costs than public enforcers. Enlisting these types of private actors as public monitors of narrowly defined areas of wrongdoing may provide governments with cost-effective ways to outsource enforcement functions that may otherwise be beyond their ability to perform.²

¹ See, e.g., John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403, 1408–09 (2002) (arguing that “the true denominator in the Enron debacle” was “the collective failure of the gatekeepers”); Hillary A. Sale, *Gatekeepers, Disclosure, and Issuer Choice*, 81 WASH. U. L.Q. 403, 403–07 (2003) (arguing that gatekeepers, such as accountants, lawyers, and investment bankers, failed the public by not adequately screening for corporate wrongdoing).

² A broad literature has explored the issue of enlisting private gatekeepers to perform public enforcement functions, but there is no clear consensus as to what unique features define gatekeepers. See, e.g., John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 308–09 (2004) (describing a gatekeeper as a “reputational intermediary” who “receives only a limited payoff from any involvement in misconduct” compared to the primary wrongdoer); Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53, 63 (2003) (defining gatekeepers as parties who “offer a service or sell a product that is necessary for clients wishing to enter a particular market or engage in certain activities”); Howell E. Jackson, *Reflections on Kaye, Scholer: Enlisting Lawyers to Improve the Regulation of Financial Institutions*, 66 S. CAL. L. REV. 1019, 1050–54 (1993) (describing gatekeepers as actors who provide indispensable, or at least extremely useful, services to the targeted wrongdoers, have similar monitoring capacities, and who cannot easily be replaced by wrongdoers); Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Strategy*, 2 J.L. ECON. & ORG. 53, 53 (1986) (defining gatekeepers as “private parties who are able to disrupt misconduct by withholding their cooperation from wrongdoers”). This article understands gatekeepers as private actors whose role as suppliers or consumers of goods or services provides them with the cost-effective ability to detect and potentially prevent wrongdoing.

This article considers how to overcome the “monitoring paradox” that public enforcers may face in attempting to monitor gatekeeper compliance.³ In many contexts the very skills or advantages that equip gatekeepers with a greater ability to detect potential wrongdoing than public enforcers may also provide gatekeepers with the means and incentives to subvert their duties and to evade public oversight. The same types of shortcomings that limit the ability of public enforcers to police certain categories of wrongdoing on their own may compromise their ability to oversee gatekeepers.⁴ For example, both policymakers and academics frequently rely on mandatory disclosures to monitor gatekeeper compliance, but in many cases public enforcers may face great difficulties verifying compliance due to the complicated nature of the disclosures or the sheer number of disclosing parties.⁵ Similarly, public enforcers may face both practical

³ The question of how to monitor gatekeeper compliance is a significant yet underscrutinized problem confronting gatekeeper regimes. Much of the literature on gatekeeper compliance has focused on determining the optimal duty standards to provide gatekeepers with adequate incentives to carry out their enforcement duties. *See, e.g.,* Stephen Choi, *Market Lessons for Gatekeepers*, 92 NW. U. L. REV. 916, 934–49 (1998) (advocating that regulators allow reputational intermediaries to design and be bound to a set of self-tailored due diligence procedures and potential sanctions to allow market-based incentives to shape liability, rather than to rely on government-imposed gatekeeper liability); Coffee, *supra* note 2, at 350–63 (advocating that auditors face modified strict liability for corporate disclosures with a cap on liability based on a multiple of their expected revenue streams from a given client and arguing that attorneys should face suspension or disbarment if they fail to monitor adequately corporate nonfinancial disclosures); Hamdani, *supra* note 2, at 102–06 (discussing how cost concerns should shape the choice between imposing strict liability, negligence, or knowledge standards on gatekeepers in any given case); Trotter Hardy, *The Proper Legal Regime for Cyberspace*, 55 U. PITT. L. REV. 993, 1044–46 (1994) (advocating the imposition of strict liability on internet system administrators to enlist them as gatekeepers against wrongdoing); Frank Partnoy, *Barbarians at the Gatekeepers? A Proposal for a Modified Strict Liability Regime*, 79 WASH. U. L.Q. 491, 540–46 (2001) (advocating the imposition of strict liability on all gatekeepers, including investment banks, accountants, and lawyers, for material misstatements and omissions in offering documents). While these questions are important for designing any gatekeeper regime, the absence of effective oversight of gatekeepers may condemn even the best-designed gatekeeper regimes to failure. If the probability of oversight is low or nonexistent, then gatekeepers may not have incentives to invest sufficiently in screening for prospective wrongdoers, may turn a blind eye to detected wrongdoers, or may even collude with wrongdoers for mutual profit.

⁴ Public enforcers may be better equipped to oversee private gatekeepers than the primary wrongdoers, but in many cases both tasks may be well beyond the theoretical and practical ability of public enforcers. *See infra* Part I.A–B.

⁵ Academics and policymakers often place great and potentially unfounded faith in the ability of public enforcers to compel and process disclosures in order to recognize gatekeeper noncompliance. *See,*

and political limits on the potential sanctions that they can impose on wayward gatekeepers.⁶ This article will argue that these shortcomings may make designing innovative ways to sustain the monitoring of gatekeeper compliance crucial for providing gatekeepers with incentives to comply with their duties.

This article will show how private enforcers may serve as effective monitors of gatekeeper compliance and complement or substitute for public oversight of gatekeepers. Enlisting private monitors is appealing because they may have cost-effective access to insider information about gatekeeper compliance, which public enforcers may not be able to acquire or may only acquire at prohibitive economic or social costs.⁷ This article will address four complementary ways in

e.g., Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2002)) (imposing governance structures and disclosure requirements on auditors and mandating that the Securities and Exchange Commission create “minimum standards of professional conduct” for lawyers); 17 C.F.R. § 205.2(e) (2003) (requiring lawyers to disclose to a corporation’s chief legal officer or chief executive officer any “credible evidence” of a material violation, by the corporation, of U.S. federal or state securities law or other laws or fiduciary duties); Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 789–98 (2004) (discussing the validity of the SEC’s disclosure rules for lawyers); Sung Hui Kim, *Ethics in Corporate Representation: The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1052–54 (2005) (criticizing the disclosure rules for lawyers as not going far enough and proposing ways to make disclosures more effective by enhancing the independence of corporate counsel).

⁶ The law and economics literature frequently posits that sanctions levels are one of many variables that can be heightened to severe levels to secure enforcement outcomes. *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 172 (1968); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1177 (2001). As a matter of political practice, the range of sanctions that may be used in any given context may be far more limited than economic theory would suggest.

⁷ Other works have explored the benefits and shortcomings of using private enforcement to fill gaps in public enforcement. *See, e.g.*, Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 54–68 (2002) (assessing the potential of a broad range of private enforcement tools); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 121–44 (2005) (arguing that administrative agencies should play a greater role in determining the existence and scope of private enforcement actions); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 186–88 (discussing how environmental nonprofit organizations and individual citizens may play important roles in uncovering information about and prosecuting environmental law violations). This article’s original contribution is showing how the enlistment of private monitors may overcome the shortcomings of public oversight of gatekeepers and provide gatekeepers with greater incentives to comply with their duties. This article will show how the

which private monitors may fill public enforcement roles. First, victims may have the incentives and the means to pursue enforcement actions against gatekeepers, especially in cases where the primary factor limiting public enforcement is resource constraints.⁸ Second, a *qui tam* approach may empower private litigants to police and initiate actions against gatekeepers in exchange for a percentage of the sanctions.⁹ Third, a broad private informant approach could enlist competitors, employees, and other members of the community to oversee gatekeeper compliance. Lastly, enforcers may paradoxically enlist as monitors the very wrongdoers that gatekeepers are supposed to oversee by offering them immunity and additional incentives to report gatekeeper violations, because they may be best placed to know and establish the nature and scope of gatekeeper noncompliance. This article will show how enlisting private enforcers to oversee private gatekeepers entails significant costs, uncertainties, and tradeoffs that must be balanced against enforcement gains. However, it will suggest that in narrowly defined contexts, each of these private enforcement tools may offer politically plausible and economically feasible ways to enhance gatekeeper compliance.

use of private monitors can dramatically enhance access to insider information on gatekeeper compliance and provide a cost-effective way to sustain oversight of gatekeepers. This article will also highlight the range of costs, risks, and uncertainties public enforcers face in relying on both gatekeepers and private monitors of gatekeepers, which makes this approach one with tremendous possibility, but also with significant tradeoffs that must be taken into account in designing gatekeeper regimes.

⁸ See, e.g., Bucy, *supra* note 7, at 13–31 (discussing a range of victim suits that are designed to compensate victims and deter wrongdoers); Stephenson, *supra* note 7, at 108 (discussing how victim suits may fill public enforcement roles). The more remote the connection between the gatekeepers and the potential victims, the less plausible it may be to enlist victims as monitors of gatekeeper compliance because of challenges in gaining insider access to information on compliance. Alternatively, the “crime” may be victimless or impose widely diffuse costs on society that make it difficult to identify particular victims.

⁹ Citizen suits are a close cousin of *qui tam* suits that are used extensively in environmental enforcement. As the discussion in part II will emphasize, citizen suits do differ from *qui tam* suits in significant ways, as *qui tam* litigants may receive a percentage of sanctions and face no standing barriers while citizen suit litigants must establish injury-in-fact and the proceeds from citizen suits go to the federal government. See Stephenson, *supra* note 7, at 99 & n.18; Thompson, *supra* note 7, at 192–94. But because many of the other substantive features of citizen suits overlap with *qui tam* suits, this article will focus on the potential of enlisting *qui tam* litigants to oversee gatekeeper compliance. See *infra* Part II.B.

This article will argue that the use of private monitors may add the most enforcement value in cases of chronic enforcement failure, where the incentives for gatekeepers and prospective wrongdoers appear closely aligned and compliance with gatekeeping duties is difficult to monitor. No case better illustrates this type of gatekeeper challenge than the context of immigration enforcement, where both a range of public enforcement efforts and an attempt to enlist employers as gatekeepers have failed to deter rising levels of undocumented aliens.¹⁰ Employers of low-wage illegal immigrants face the threat of gatekeeper liability, yet have strong economic incentives to subvert their duties and face a low probability that noncompliance will be detected.¹¹

Therefore, this article will explore the potential for private monitoring of gatekeepers by laying out a proposal for reforming employers' duty to verify employees' legal status.¹² This

¹⁰ See *infra* Part III.B.

¹¹ See, e.g., Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 347–48 (1994) (highlighting how the employer verification regime has failed to reduce illegal immigration); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 688–95 (1997) (arguing that the employer verification system has failed to deter illegal immigration); Spencer S. Hsu & Kari Lydersen, *Illegal Hiring is Rarely Penalized*, WASH. POST, June 19, 2006 (discussing how the Bush administration “virtually abandoned employer sanctions before it began pushing to overhaul U.S. immigration laws last year” and noting how “[t]he government’s steady retreat from workplace enforcement in the 20 years since it became illegal to hire undocumented workers is the result of fierce political pressure from business lobbies, immigrant rights groups, and members of Congress”).

¹² See *infra* Part IV. Reform of employer verification duties is a timely topic as illegal immigration has become a significant issue in the run-up to the 2006 mid-term elections. Proposals to strengthen employer verification duties are one of many issues that Congress has considered as part of broader immigration reform. For example, both H.R. 4437, which passed the House in December, 2005, and S.2611, which passed the Senate in May, 2006, would require employers to confirm the social security numbers of job applicants against an electronic database and significantly increase sanctions for employer noncompliance. See H.R. 4437, 109th Cong. §§ 701, 702 (2005); S. 2611, 109th Cong. §§ 274A(d), 274A(e) (2006). The House and Senate have been at loggerheads over whether immigration reform should focus on enforcement or more comprehensively address immigration issues, such as introducing a temporary worker program and addressing legalization of existing undocumented aliens. See Carl Hulse, *House Adds Hearings on Immigration*, WASH. POST June 21, 2006. This Article has neither the space or time to analyze the strengths and shortcomings of the House and Senate proposals. But as part IV will discuss, integrating electronic verification into the employer verification duties is part of the solution and would form an important tool for heightening the accuracy of the verification process and making identity

approach will show how competitors, employees, other community members, and even undocumented aliens may serve as private monitors of employer compliance and help to overcome the information and resource gaps that cripple public oversight of employer compliance. The contentiousness of immigration enforcement makes assessing the costs and benefits of heightened enforcement difficult.¹³ Nonetheless, this article will suggest how private monitoring of gatekeepers, coupled with other reforms to heighten the accuracy and cost-effectiveness of gatekeeper compliance and to safeguard against incentives for preemptive discrimination against legal individuals of foreign origin, may overcome the shortcomings of public enforcement.

Part I will highlight the structural and practical limits of public enforcement that in many contexts create the need to enlist private gatekeepers to detect and deter prospective offenders. It will show how gatekeepers may be well positioned to fill enforcement gaps and, in some cases, may provide the only means to uncover wrongdoing. This part will also underscore the challenges policymakers face in designing effective gatekeeper regimes. Part II will focus on ways to overcome the difficulties public enforcers face in overseeing gatekeeper compliance. It

and document fraud by undocumented aliens more difficult. However, part IV will show how this approach is an incomplete solution by itself as employers will continue to retain the ability and the incentives to sidestep or subvert verification requirements if there is no sustained oversight of compliance measures, such as through the enlistment of private monitors.

¹³ Immigration issues understandably raise political passions, as the debate on immigration reform in 2006 has underscored. See, e.g., Nina Bernstein, *In the Streets, Suddenly, an Immigrant Groundswell*, N.Y. TIMES, Mar. 27, 2006, at A1 (discussing how hundreds of thousands of people across the country marched to protest Congress's consideration of immigration enforcement legislation); Nina Bernstein, *On Lucille Avenue, The Immigration Debate*, N.Y. TIMES, June 26, 2006 (discussing "the grass-roots anger over immigration policy that many members of Congress say they keep hearing in their districts"). This article has neither the time nor space to do the extensive debates on immigration enforcement any justice. This topic was chosen because of the extraordinary challenge that immigration enforcement poses to public enforcers as this case study offers a chance to explore the potential and limits of both private gatekeepers and private monitors. For an overview of debates on immigration reform, see GEORGE J. BORJAS, *HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY* (2001); BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* (2004); PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* (1998).

will show that the structural and practical limits of public enforcement that make public enforcers poorly positioned to detect primary wrongdoers may frequently make them almost or equally as poor monitors of gatekeeper compliance. For this reason, this part will assess the benefits and costs of using a range of private enforcers, such as victims, qui tam litigants, private informants, and even the primary wrongdoers to oversee gatekeeper compliance.

Parts III and IV will apply the insights on private monitoring to the enforcement challenges surrounding illegal immigration.¹⁴ For over twenty years, public enforcers have enlisted private employers as gatekeepers to confirm immigration status, but failed to create adequate incentives for employer compliance. These two parts will suggest how enlisting private monitors to oversee employer gatekeepers could lead to dramatic enforcement enhancements at palatable political and economic costs.¹⁵ Although these enforcement gains entail social costs and tradeoffs that society may not wish to accept, this proposal will suggest that the failure of the employer verification system is a product of a lack of vision, rather than a matter of inevitability.

I. THE POTENTIAL AND CHALLENGES OF ENLISTING GATEKEEPERS

A. The Case for Gatekeeper Liability

1. *The Limits of Public Enforcement*

The rationale for enlisting private gatekeepers turns on the limits of public enforcers and the comparative advantages gatekeepers may enjoy in overseeing the primary wrongdoers.¹⁶ For

¹⁴ See, e.g., Espenosa, *supra* note 11, at 347–48 (documenting the failure of the employer verification regime to reduce the employment of undocumented aliens); Andrew Parker, *Collecting What America Owes*, FIN. TIMES, Feb. 28, 2005, at 12 (quoting Mark Everson, head of the Internal Revenue Service, as saying, “What we cannot afford is to let our tax laws be viewed in the same way as our immigration or drug laws are, where too large a segment of the population says: ‘Those laws are not what we respect.’”).

¹⁵ See *infra* Part III.C.

¹⁶ See Kraakman, *supra* note 2, at 61–66 (discussing how private actors may offer advantages over public enforcers as “bouncers” or “chaperones” in screening prospective wrongdoers in one-off contexts or repeat player interaction respectively).

example, in a world without resource constraints, the Securities and Exchange Commission might be able to confirm the accuracy of every corporate disclosure and transaction, but in the real world of scarcity, lawyers and accountants are likely far better positioned to detect signs of wrongdoing by their clients. The challenge for public enforcers is that regardless of the theoretical scope of legal obligations and the level of sanctions facing wrongdoers, the ability to deter wrongdoing will prove only as effective as the reach (or rather wrongdoers' perceptions of the reach) of public enforcers extends. In spite of how sweeping public enforcement powers may be in theory, in practice, the efficacy of public enforcement is often compromised by limits in public enforcers' ability to monitor private actors, scarce resources to fulfill competing enforcement mandates, and the low responsiveness or nonresponsiveness of the primary wrongdoers to the threat of sanctions.¹⁷

In many contexts public enforcers may be unable to gain access to information about wrongdoing on their own or to process the available information effectively. The more complex the activity or the offense, the more prospective offenders may enjoy an advantage over enforcers in concealing their wrongdoing.¹⁸ Public enforcers may be skilled in gathering information on and apprehending those who literally rob banks.¹⁹ In contrast, public enforcers often may lack the skills and access to information to oversee more complex types of wrongdoing, such as the accounting frauds perpetrated by executives at Enron, WorldCom, and

¹⁷ See *id.* at 56–57.

¹⁸ See, e.g., Donald C. Langevoort, *Technological Evolution and the Devolution of Corporate Financial Reporting*, 46 WM. & MARY L. REV. 1, 3–16 (2004) (arguing how changes in financial markets, changes in business-to-business relationships, and the growth of new financial products have made fraud far easier and more likely to occur).

¹⁹ When insiders are the people robbing the banks, public enforcers may be slow both to detect the wrongdoing and to intervene to stop the harm. See David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1162 & n.74 (1993) (noting the shortcomings of public regulators in overseeing the infamous Lincoln Savings & Loan).

Sunbeam. Few public enforcers may be experts in arcane accounting rules,²⁰ and even those who are may be less capable of detecting fraud than their private sector counterparts working for corporations, law firms, and accounting firms are in concealing their tracks.²¹ For example, although heightened disclosure requirements may make it easier for public enforcers to oversee corporations,²² informed insiders, such as a corporation's accountants and lawyers, may still be the only actors who are in a position to detect fraud.²³

A related problem is that private networks may be so dense that they are difficult for public enforcers to penetrate and effectively oversee. The ethnic-based networks that facilitate most

²⁰ For example, in 2001 the Securities & Exchange Commission had approximately 600 accountants or financial analysts and 200 investigators or examiners who were supposed to oversee approximately 14,000 public companies, 8000 registered broker-dealers employing 700,000 registered representatives, 8000 transfer agents, 5000 investment companies, 7400 registered investment advisers, as well as the stock exchanges. See U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO-02-302, SEC OPERATIONS: INCREASED WORKLOAD CREATES CHALLENGES 3 (2002). While the SEC's funding and staffing has increased in the wake of the Sarbanes-Oxley Act, the number of accountants and investigators is still dwarfed by the enormity of their oversight tasks.

²¹ For example, Steven Schwarcz argues that "the Enron debacle highlights the increasingly widespread problem of complexity" that makes it difficult to regulate and oversee "virtually all securitization and derivatives deals and other forms of structured-financing transactions." He asserts that these transactions may be so complicated that even sophisticated private investors may have difficulty in understanding detailed disclosures in a reasonable time period. See Steven L. Schwarcz, *Rethinking the Disclosure Paradigm in a World of Complexity*, 2004 U. ILL. L. REV. 1, 2–6, 18–20.

²² See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2002)); see also David S. Ruder et al., *The Securities and Exchange Commission's Pre- and Post-Enron Responses to Corporate Financial Fraud: An Analysis and Evaluation*, 80 NOTRE DAME L. REV. 1103, 1112–13 (2005) (describing the Sarbanes-Oxley Act's expansion of disclosure requirements as the "most far-reaching reforms in the securities laws regulating corporations since the enactments of the Securities Act of 1933 . . . and the Securities and Exchange Act of 1934").

²³ See, e.g., Coffee, *supra* note 2, at 336–37 (arguing that the Sarbanes Oxley Act does not adequately address the incentives that corporate directors and officers have to "cook the books" and that accounting gatekeepers have to acquiesce to irregularities); Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (and it Just Might Work)*, 35 CONN. L. REV. 915, 918–20 (2003) (describing the Sarbanes-Oxley Act as sweeping in scope concerning what it claims to address, but limited in its direct efforts and ability to enhance accounting compliance or corporate governance).

illegal immigration exemplify this type of challenge.²⁴ A web of family, regional, and ethnic ties inform prospective immigrants about opportunities in the United States, facilitate illegal entry into the United States and relocation into ethnic communities, and often match immigrants with employers.²⁵ Linguistic and cultural barriers, as well as economic interests and threats of violence from human smuggling and trafficking networks, may create a wall of silence in ethnic communities.²⁶ Even linguistically capable and culturally sensitive public enforcers may be unable to overcome these obstacles on their own to police illegal immigration, or they may be capable of doing so only at prohibitive economic and social costs.

Another challenge public enforcers face is how to target wrongdoers when they have a low level of responsiveness to enforcement actions or are judgment-proof.²⁷ Typically, it appears both just and economically efficient for the primary wrongdoers to face direct sanctions to force them to internalize much of the costs of their actions. However, public enforcers are placed in a quandary when sanctions, such as the revocation of licenses, monetary sanctions, or imprisonment are hollow threats that the government either cannot carry out for political or

²⁴ See, e.g., RICHARD ALBA & VICTOR NEE, REMAKING THE AMERICAN MAINSTREAM 188–190 (2003) (discussing how ethnic social networks form a channel for disseminating information on economic opportunities and facilitating illegal entry and settlement in the United States).

²⁵ See, e.g., ALEJANDRO PORTES & RUBEN G. RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 230–34 (1996) (discussing how family, community, and ethnic networks facilitate illegal immigration flows and help to match undocumented aliens with employers); Douglas S. Massey, *The Social and Economic Origins of Immigration*, 510 ANNALS 60, 68–70 (1990) (discussing the role that social and familial networks play in facilitating legal and illegal immigration).

²⁶ Ethnic-based criminal networks often facilitate human trafficking and smuggling, and they may easily threaten violence against members of their ethnic communities or their relatives in their home countries to deter any cooperation with authorities. See Hussein Sadrudin, Natalia Walter & Jose Hidalgo, *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL’Y REV. 379, 382–84 (2005).

²⁷ The low level of responsiveness may be due to the inability of enforcers to impose sanctions or to the sheer obliviousness of the targets. For example, homeowners and small business owners may have widespread ignorance about how the wide range of environmental regulations may affect them. See Kraakman, *supra* note 2, at 56 & n.7.

economic reasons or because there is nothing of worth to the wrongdoer to seize.²⁸ Alternatively, the problem may be practical limits on the level of sanctions, which pale in comparison to the returns from wrongdoing.²⁹ For example, the chronic failure of drug enforcement in spite of high sanctions and high expenditures on enforcement underscores the fact that the returns from illicit activity may so substantially outweigh the expected value of sanctions that they have little deterrence value to prospective wrongdoers. In these contexts, it may be an exercise in futility simply to throw more resources at the problem or to tweak the tactics of public enforcers in an effort to heighten direct enforcement against primary wrongdoers.

Even in contexts where higher public enforcement levels could make a significant impact, public enforcers generally face competing enforcement priorities and limited resources.³⁰ In a world without resource constraints, public enforcers could attempt to go through every tax return and confirm every oxycontin prescription's validity. But while academics may have the luxury of assuming away the problem of scarcity, public enforcers often must make do with what resources they have. At a time in which counter-terrorism priorities have begun to trump more routine law enforcement activities, public enforcers have had to become even more accustomed to trying to do more with less.³¹

²⁸ Public enforcers confront this problem when trying to enforce laws against illegal immigrants, attempting to collect fines from bankrupts, or to punish children who have committed criminal offenses. *See id.* at 57.

²⁹ *See* Steven Shavell, *A Note on Marginal Deterrence*, 12 INT'L REV. L. & ECON. 345, 345 (1992) (discussing how marginal deterrence concerns constrain the level of sanctions which can be imposed for any given offense because of fears that more harmful offenses may thus appear "costless" to the offender).

³⁰ *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 181–82 (1992) (discussing how private enforcement may be vital for filling enforcement gaps caused by limited public resources).

³¹ For example, the consolidation of a broad range of federal agencies into the Homeland Security Department signifies the subordination of other federal enforcement objectives to national security

2. *The Appeal of Gatekeepers*

Enlisting private gatekeepers offers public enforcers the potential to overcome these obstacles to enforcement in cost-effective ways.³² In many cases, gatekeepers may offer the only alternative when public enforcers cannot otherwise identify or prosecute primary wrongdoers. Private gatekeepers fall into two broad categories: suppliers and consumers whose lawful activities are necessary for wrongdoers to pursue their illicit ends.³³ The distinctive features of these demand- or supply-driven relationships with prospective wrongdoers may significantly shape the responsiveness of gatekeepers to threats of liability.

The conventional image of gatekeepers is private actors, often professionals, who offer lawful products or services that may be used to legitimize or substantially advance illicit ends.³⁴ These suppliers may literally function as “gates” inasmuch as the goods or services they supply are essential to perform certain illicit acts or are functionally essential because of the high cost or

concerns in the wake of the September 11, 2001, attacks. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 05–06, IMMIGRATION ENFORCEMENT: DHS HAS INCORPORATED IMMIGRATION ENFORCEMENT OBJECTIVES AND IS ADDRESSING FUTURE PLANNING REQUIREMENTS 5–7 (2004) (discussing how “immigration enforcement should be viewed as part of a comprehensive homeland security strategy” and noting how particular objectives such as worksite enforcement are now focused almost exclusively on advancing national security objectives); Jeffrey Manns, Comment, *Reorganization as a Substitute for Reform: The Abolition of the INS*, 112 YALE L.J. 145, 151–52 (2002) (discussing how the Homeland Security Act reorganization would lower the profile for immigration issues).

³² *See* Kraakman, *supra* note 2, at 61–66 (discussing potential ways that private gatekeepers may complement public enforcement).

³³ One could add a third category and frame public regulators as gatekeepers. *See* Peter B. Oh, *Gatekeeping*, 29 J. CORP. L. 735, 755–66 (2004). But public actors may have strikingly different incentives and responsiveness than private actors. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 414–15 (2000). For this reason, lumping public regulators with private gatekeepers may only muddy the waters for considering the optimal scope of private gatekeepers’ duties and means for oversight.

³⁴ *See, e.g.,* Hamdani, *supra* note 2, at 58 (defining gatekeepers as parties who “offer a service or sell a product that is necessary for clients wishing to enter a particular market or engage in certain activities”); Jackson, *supra* note 2, at 1050–54 (describing gatekeepers as actors who provide indispensable, or at least extremely useful, services to the targeted wrongdoers, have similar monitoring capacities, and who cannot easily be replaced by wrongdoers).

drawbacks of alternatives.³⁵ Lawyers and accountants who serve corporations, doctors who write prescriptions for drugs, and internet service providers all fall under this category.³⁶ Some of these service providers may actively collude with wrongdoers to retain or expand their business. However, the more significant threat for policymakers is that gatekeepers will not have the incentives to invest sufficiently in screening for prospective wrongdoers or turn a blind eye in the absence of a credible threat of liability.³⁷

Other gatekeepers may create the demand that attracts prospective wrongdoers.³⁸ The paradigm case for demand-driven gatekeepers is employers whose attempts to keep wage levels as low as possible attract underage workers or undocumented aliens.³⁹ Another example is American companies that outsource production facilities to firms in developing countries, which (“unbeknownst” to the American companies) abuse human rights to cut costs or bribe officials to help their business and indirectly aid their American clients.⁴⁰ These gatekeepers may pose the

³⁵ See Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 883 (1990) (arguing that a defining feature of gatekeepers is that the targeted “misconduct cannot occur without the gatekeeper’s participation”); Kraakman, *supra* note 2, at 54, 61–63 (arguing that “a specialized good, service, or form of certification that is essential for the wrongdoing to succeed—is the ‘gate’ that the gatekeeper keeps”). While these authors emphasize how a gatekeeper’s goods or services are necessary for the targeted wrongdoers’ illicit acts, their views overstate the distinctiveness of the goods or services that gatekeepers supply or demand. Generally, going through a gatekeeper offers a more cost-effective option for prospective wrongdoers who can almost always secure or demand goods or services at greater cost through the underground economy.

³⁶ Other examples include bar owners who have a license to serve alcohol, yet face legal liability for serving minors or for serving drunken individuals. See Kraakman, *supra* note 2, at 63.

³⁷ See *id.* at 61–63.

³⁸ See *id.* at 53 (defining gatekeepers as “private parties who are able to disrupt misconduct by withholding their cooperation from wrongdoers”). Kraakman’s definition of gatekeepers is consistent with both a supply-side and demand-side conception of gatekeepers, although in practice, his and most other writings on gatekeepers focus on supply-side driven gatekeepers.

³⁹ See *id.* at 54.

⁴⁰ American firms may outsource production in developing countries as a way of sidestepping limits imposed by the Foreign Corrupt Practices Act (FCPA). While corruption by agents of the U.S. firm may still fall within the FCPA’s scope, these types of violations may be hard for public enforcers to monitor. See H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 29–35 (1998) (laying out the scope of parent-subsidiary liability under the FCPA).

greatest challenges for public enforcers to oversee. The economic interests of this type of gatekeepers and their suppliers may be intimately interconnected and oriented towards explicit or tacit subversion of the law.

The defining characteristic of both types of gatekeepers is their dual capacity: the services they offer or demand may serve lawful ends or they may substantially assist wrongdoers in pursuing their illegal activity.⁴¹ Because of their commercial or professional relationships, gatekeepers may enjoy privileged access to information about prospective wrongdoing or skills that may allow them to process and recognize potential illegal acts in cost-effective ways. In contrast, public enforcers may lack access to this information or the ability to process the information, except at prohibitive economic and social costs or disruption to markets. Alternatively, the primary wrongdoers may be very difficult or impossible for public enforcers to target directly because the wrongdoers are judgment-proof or outside of American jurisdiction, such as in the case of foreign outsourcing companies or illegal pornography or gambling websites based outside of the United States.⁴²

The argument for enlisting gatekeepers turns on the efficiency of focusing policing on the gatekeepers rather than on the primary wrongdoers. Gatekeepers may be able to deter primary wrongdoers more easily and cost-effectively than public enforcers. Gatekeepers often receive a disproportionately small percentage of the fruits of the wrongdoing, yet bear disproportionate exposures to a risk of loss from both detection of the wrongdoing and the resulting gatekeeper

⁴¹ If the gatekeepers merely provided or demanded illegal services, then these cases would fall under accomplice liability or conspiracy to commit criminal acts or civil wrongs. But the fact that the goods or services gatekeepers demand or supply can generally be used either legally or illegally places gatekeepers in a unique position as potential screeners of wrongdoing, yet makes their culpability more ambiguous as they may or may not actively or tacitly assist in wrongdoing.

⁴² See Matthew Miller, *Catch Me If You Can*, FORBES, Mar. 27, 2006, at 113 (discussing how offshore gambling web-sites escape U.S. jurisdiction).

liability or reputational effects.⁴³ Gatekeepers' assets may be more vulnerable to seizure or liens than those of prospective wrongdoers; they may enjoy revocable rights such as licenses; or gatekeepers may simply be fewer in number than the primary offenders they are called to oversee. Although gatekeepers may be more responsive to the threat of sanctions than primary wrongdoers, in practice this difference may simply be one of degree. As significantly, the fact that public enforcers may theoretically be able to target gatekeepers with sanctions does not necessarily mean that enforcers are in a position to oversee gatekeeper compliance.

But even if gatekeepers may be responsive to sanctions, the question of whether the threat of gatekeeper liability will heighten enforcement levels in any given context turns on whether gatekeepers can screen effectively for prospective wrongdoers in a cost-effective way.⁴⁴ Gatekeepers may strengthen public enforcement by withholding their support from wrongdoers,⁴⁵ by notifying public enforcers when wrongdoers are detected,⁴⁶ or by routinely providing the government with relevant documentation about their suppliers or clients that make it easier for government actors to screen and develop patterns or profiles of wrongdoers.⁴⁷ These

⁴³ See Coffee, *supra* note 2, at 308–09.

⁴⁴ See Hamdani, *supra* note 2, at 104.

⁴⁵ This is the conventional vision of the role for gatekeepers literally to close the gates by withholding their services. See, e.g., Kraakman, *supra* note 2, at 54 (“Gatekeeper liability is distinguished by the duty that it imposes on private ‘gatekeepers’ to prevent misconduct by withholding support. This support—usually a specialized good, service, or form of certification that is essential for the wrongdoing to succeed—is the ‘gate’ that the gatekeeper keeps.”). This narrow conception of gatekeepers misses the fact that literal gatekeepers often also performed other important functions of recording information and pulling the alarm when wrongdoing was identified. A gatekeeper who did anything less might well have risked his neck by being viewed as betraying his duty.

⁴⁶ This approach would effectively make voluntary whistleblowing compulsory for gatekeepers and leave the decision about whether and how to act on information about potential wrongdoing in the hands of public enforcers.

⁴⁷ Employers and banks routinely face this type of requirement. For example, employers and investment companies must disclose individual wages and capital gains to the Internal Revenue Service, which at least in theory equips the IRS to police tax fraud. Immigration officials could also piggyback off of this preexisting duty to check whether multiple parties are attempting to use the same social security numbers, thus signaling possible illegal immigrant employment. Banks must disclose cash transfers of

potential complementary roles to public enforcement suggest why enlisting gatekeepers may appear to be an attractive policy option.⁴⁸

3. The Question of Whether Gatekeeping Liability is Necessary

The fact that enlisting gatekeepers to screen for primary wrongdoers may have significant advantages does not necessarily mean that public enforcers should enlist gatekeepers through the threat of liability. Some prospective gatekeepers may have such a tenuous relation with consumers or service providers that it would seem unreasonable to subject them to gatekeeping obligations. For example, although sophisticated color printers may be used to print counterfeit currency, it would be extraordinarily difficult and costly for companies to identify or monitor prospective wrongdoers in this context.⁴⁹ In contrast, it appears reasonable to use the threat of liability to require gun salesmen to screen for former felons by checking identification against federal and state databases. In the context of gun sales, the risk factors would be high and the monitoring burden would be comparatively low on both gatekeepers and their customers.⁵⁰ Although no precise formula exists for who may serve as a desirable gatekeeper, the plausibility of a gatekeeper duty appears to turn on whether a gatekeeper has access to reasonably cost-effective means to identify prospective wrongdoers.⁵¹

\$10,000 or more, with a similar goal of alerting the police to transactions that may be related to illicit activity, such as money laundering. 31 C.F.R. § 103.22 (2005).

⁴⁸ The extent to which gatekeepers may complement or substitute for public enforcement ultimately depends on the particulars of the enforcement context. *See, e.g.*, Jackson, *supra* note 2, at 1048–49 (arguing that public regulatory controls of financial institutions must remain the focus of securities enforcement efforts and that gatekeepers must assume a more limited, complementary role at best).

⁴⁹ If copier companies were held strictly liable, one can imagine mandatory purchases or insurance or postings of bonds that would cover this risk. But these costs would either cut into the printers' profits or economic viability if they could not be passed on to customers, or serve as a new tax on all customers that may price marginal users out of purchasing copiers, thus causing a deadweight loss.

⁵⁰ *See* Brady Act, 18 U.S.C. § 922 (2000) (enlisting gun dealers as gatekeepers for screening for former felons).

⁵¹ If the costs of screening are too high, then gatekeepers may either stop demanding or offering services, relocate to a jurisdiction where they do not face gatekeeper liability, or shift to the underground

Some private actors may routinely perform gatekeeper functions on their own because the reputational costs far outweigh the marginal returns they may gain from colluding with wrongdoers or casting a blind eye to their wrongdoing.⁵² In the case of true reputational intermediaries,⁵³ adding gatekeeper liability may simply raise the financial exposure of gatekeepers yet have little effect on heightening enforcement efforts. The best candidates for reputational intermediaries are third parties with no direct connection to the prospective wrongdoers who may perform gatekeeper functions on their own and make gatekeeper liability a redundancy at best.⁵⁴ Here, the classic case is the role that Moody's Investors Service, Standard & Poor's Rating Services, and Fitch Investors Service play in assessing corporate debt offerings for creditworthiness, as their economic interest lies in their accuracy.⁵⁵ Although these types of

economy. It is clear that the level of compliance costs coupled with residual liability must be lower than the gatekeepers' valuations of demanding or offering services, but how low these costs must be depends on the context of individual markets.

⁵² See Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 U.C.L.A. L. REV. 781, 787 (2001) (arguing that reputational intermediaries are "repeat players who will suffer a reputational loss, if they let a company falsify or unduly exaggerate its prospects, that exceeds their one-time gain from permitting the exaggeration"); see also Reinier Kraakman, *Corporate Liability and the Costs of Legal Controls*, 93 YALE L.J. 857, 898 & n.124 (1984) (describing how reputational intermediaries may face analogous incentives to publicly imposed gatekeeper liability because these intermediaries "place established reputations on the line").

⁵³ In practice, reputational markets appear inefficient as reputational intermediaries in the securities markets have repeatedly demonstrated by their failures over the past decade. See Coffee, *supra* note 2, at 311–18 (documenting the failures of reputational intermediaries in securities law compliance); Frank Partnoy, *Strict Liability for Gatekeepers: A Reply to Professor Coffee*, 84 B.U. L. REV. 365, 366–37 (2004); see also Black, *supra* note 52, at 787–89 (arguing that true reputational intermediaries cannot fulfill their role in vouching for disclosure quality and thus reducing information asymmetry in securities markets because of the ability of false reputational intermediaries to free-ride off of true reputational intermediaries' credibility and to provide false or misleading information on securities).

⁵⁴ To the extent to which gatekeeper liability would burden these actors with liabilities that these actors could not screen for (or only at prohibitive cost), gatekeeper liability may have the perverse effect of raising the costs of their services or causing them to exit the market.

⁵⁵ See Steven L. Schwarcz, *Private Ordering of Public Markets: The Rating Agency Paradox*, 2002 U. ILL. L. REV. 1, 26 (arguing that rating agencies' "reputational motivation is sufficient" and that "[a]dditional regulation of rating agencies thus would impose unnecessary costs and thereby diminish efficiency"). In some cases corporations directly pay rating agencies to assess their creditworthiness, but there is little evidence that corporations have been able to manipulate ratings of their debt. To the extent to which there is a danger of interconnections of interests that distort ratings, it may lie in the ancillary

third parties may still be far from perfect gatekeepers in policing wrongdoing,⁵⁶ they may make liability-driven monitoring by other intermediaries more costly than it is worth in terms of enforcement outcomes.

In contrast, advocates for professions such as law, medicine, and accounting may argue that their reputations are their business.⁵⁷ However, a reliance on self-professed reputational intermediaries alone may prove to be a risky approach in many contexts. This risk would be high if these intermediaries have direct relationships with prospective wrongdoers, especially if wrongdoers form a significant portion of their client base, or if the intermediaries have more indirect economic interests that may compromise their independence.⁵⁸ If the intermediaries' incentives are rightly (or rather wrongly) aligned with wrongdoers, then this reputational cover may be the very good that these actors can leverage to cover up wrongdoing.⁵⁹ For this reason,

services that the rating agencies or their parent companies provide. See Claire A. Hill, *Regulating the Ratings Agencies*, 82 WASH. U. L.Q. 43, 50–52 (2004).

⁵⁶ One significant concern is how a combination of regulatory barriers to entry and the nature of the ratings market have led to the existence of only a small number of ratings companies, which means that there are only a limited set of eyes watching the gates. See Frank Partnoy, *The Paradox of Credit Ratings*, in RATINGS: RATING AGENCIES AND THE GLOBAL FINANCIAL SYSTEM 65, 66 (Richard M. Levich et al. eds., 2002). Another concern is that rating agencies have a good track record of assessing risks in initial ratings of creditworthiness, but in recent years have done a poorer job in the timing of upgrades and downgrades of corporate ratings. See Hill, *supra* note 55, at 67–68.

⁵⁷ See, e.g., Victor P. Goldberg, *Accountable Accountants: Is Third-Party Liability Necessary?*, 17 J. LEGAL STUD. 295, 296–98 (1988) (arguing that the reputational costs that accountants may face from failing to detect wrongdoing gives them adequate incentives to monitor their clients); see also DiLeo v. Ernst & Young, 901 F.2d 624, 629 (7th Cir. 1990) (arguing that an accountant's concern for her reputation and exposure to potential loss would make collusion with her clients' accounting fraud irrational).

⁵⁸ Even if institutions consciously seek to function as reputational intermediaries, the individual interests and business relationships of analysts may compromise the institutions' reputational intermediary role.

⁵⁹ See, e.g., Choi, *supra* note 3, at 920 (arguing that producers will not engage in fraud only if “the long-term reputational loss is greater than the short-term gain the producer received from overstating the value of . . . lower quality [information]”); Coffee, *supra* note 2, at 309–11 (discussing how incentives for reputational intermediaries may change over time and cause them to stop fulfilling their gatekeeper roles); Peter B. Oh, *Gatekeeping*, 29 J. CORP. L. 735, 752 (2004) (arguing that “in the long-run, reputational intermediaries will commit fraud if the risk is acceptable either for the firm or its agents”); Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95

policymakers should employ healthy skepticism about gatekeepers' claims that their self-interest or market incentives cause them to screen optimally for wrongdoers without the threat of liability.

B. The Challenges Surrounding the Design of Gatekeeper Regimes

If public enforcers cannot effectively target primary offenders on their own and market actors lack sufficient incentives to police wrongdoers, then gatekeeper liability becomes an appealing strategy. However, enthusiasm for enlisting gatekeepers should be tempered by concerns about the cost-effectiveness and potential collateral consequences of this approach.⁶⁰ Policymakers must consider whether the costs gatekeeper liability would inflict on the government, the gatekeepers, and markets as a whole are less than the costs that similar levels of public enforcement would entail.⁶¹ The issue is not merely one of efficiency, but also concerns political palatability in determining whether enforcement gains justify the economic and social costs on the state and society.⁶²

Policymakers may be able to anticipate some costs of gatekeeper compliance with a high degree of precision. But the limited information that both policymakers and gatekeepers possess makes it difficult to anticipate the full costs and collateral effects of gatekeeper liability.

NW. U. L. REV. 133, 143–47 (2002) (discussing reasons why reputational intermediaries will put their reputations in jeopardy).

⁶⁰ See, e.g., Jackson, *supra* note 2, at 1070–74 (arguing that greater public regulation may be an appealing alternative to imposing gatekeeper liability on lawyers because of the difficulties in designing and enforcing gatekeeper regimes and politicians' "irresistible" temptation to create rules that overdeter). But see Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 726–27 (1996) (discussing how it is often assumed that defendants are in a better position than policymakers to assess costs and benefits and to adopt the optimal response).

⁶¹ See Kraakman, *supra* note 2, at 75 (framing the costs that gatekeeper liability may create as administrative, private, and tertiary costs).

⁶² Law and economics literature often overlooks, or rather assumes away, the question of political viability. But the benefits of private enforcement tools, such as gatekeepers, may come with greater social costs (or at least greater uncertainties concerning the scope of social costs), and therefore concerns of political feasibility may be interconnected with the question of efficiency.

Designing gatekeeper regimes entails uncertainties surrounding the effects of liability standards on gatekeeper behavior and markets, difficulties in assessing the relative costs versus benefits of gatekeeper liability and setting the level of sanctions, as well as significant challenges in overseeing gatekeepers. This article will focus on overcoming the obstacles to monitoring gatekeeper compliance, but it is important to highlight the range of costs that gatekeeper liability may inflict on gatekeepers and markets, as policymakers must weigh all of these costs in designing liability and oversight mechanisms.

1. The Challenges of Choosing Liability Standards

Much of the literature on gatekeepers has focused on what standard to impose on gatekeepers and, in particular, on the potential for strict liability.⁶³ However, policymakers' limited information about gatekeepers' responsiveness to liability risks and limited ability to monitor gatekeeper compliance means that any standard will entail uncertain costs and effects on gatekeepers and markets. For this reason, policymakers must approach standard-setting as an imprecise science based on assessments of the relative risks of under- or overdeterrence from any given standard.⁶⁴

Strict liability, negligence, and knowledge-based duties for gatekeepers each have distinct advantages and disadvantages. Strict liability shifts the burden of determining optimal

⁶³ See, e.g., Coffee, *supra* note 2, at 350–63 (advocating that auditors face modified strict liability for corporate disclosures); Hardy, *supra* note 3, at 1044–46 (advocating strict liability on internet system administrator gatekeepers); Partnoy, *supra* note 3, at 540–41 (2001) (advocating the use of strict liability for gatekeepers in the securities offering context). But see Hamdani, *supra* note 2, at 114 (arguing strict liability would overdeter in most contexts and impose excessive costs relative to the enforcement gains).

⁶⁴ Liability incentives created by a given standard may lead gatekeepers to undertake costly compliance efforts or avoidance strategies, such as greater discrimination against suspect classes or decisions to exit the market in part or in whole. See Kraakman, *supra* note 2, at 75–78. These collateral effects may distort markets and significantly raise costs or bar access for legitimate market participants.

compliance levels into the laps of gatekeepers,⁶⁵ and saves courts and public enforcers the costly and difficult tasks of ferreting out subtle distinctions between good-faith compliance and subversive obfuscation.⁶⁶ The case for negligence is that strict liability may overdeter by punishing good-faith efforts to comply even in cases where there was no way (or at least no reasonably cost-effective way) that enforcers could have identified the wrongdoers.⁶⁷ However, gatekeepers may still be overly cautious if they face significant uncertainty concerning what constitutes good-faith compliance.⁶⁸ If the concern is deterring the targeted activity at any price, then strict liability may have great appeal because of potential chilling effects, although a strict liability approach is likely to pose the largest costs and most uncertain effects on markets in the process. In contrast, negligence poses potential risks of under- or overdeterrence depending on the degree of ambiguity concerning what reasonable compliance measures consist of and the costs of compliance relative to liability avoidance strategies.⁶⁹

The downside of these sweeping standards is that they may prove too burdensome and costly in any given context. These standards may provide gatekeepers with incentives to exit or

⁶⁵ It is important to note that strict liability would only theoretically force gatekeepers to internalize the cost of their misconduct. Even an optimal standard and sanction would bear little fruit if the probability of enforcement were low. See Coffee, *supra* note 2, at 322–23.

⁶⁶ See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 5–17 (1987) (providing a comprehensive overview of the merits of strict liability versus negligence liability).

⁶⁷ But see Partnoy, *supra* note 3, at 510–516 (discussing the costs that imposing negligence liability on gatekeepers may inflict).

⁶⁸ See Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1, 10–14 (1994) (discussing how varying interpretations by courts concerning what constitutes good-faith compliance may lead to excessive caution by potential defendants).

⁶⁹ The more ambiguous the question of reasonable compliance is, the greater the residual liability that gatekeepers will face under a negligence standard. Similarly, the higher the costs of compliance relative to liability avoidance strategies, the more likely gatekeeper liability will cause distorting effects on markets. The relative weight of these two factors may largely determine whether negligence liability poses greater risks of over- or underdeterrence. See Partnoy, *supra* note 3, at 510–16.

to selectively reduce their exposure to markets.⁷⁰ This may push markets into the underground economy or result in greater discrimination against suspect classes.⁷¹ For example, much of the debate concerning liability for employer gatekeepers in the immigration context turns on the legitimate concern that discrimination against individuals of perceived foreign origin may appear to be the cost-effective way for employers to minimize liability exposure.⁷² If the odds of and damages from successful employment discrimination suits are low enough, gatekeepers may find routine discrimination to be a preferable strategy to good-faith efforts at compliance. Additionally, gatekeeper strategies of exiting markets or discriminating against prospective clients or service providers with suspect characteristics may force otherwise law-abiding people into the underground economy and actually heighten levels of wrongdoing taking place outside of the public eye.

In contrast, a knowledge-based standard would impose the lightest burden on gatekeepers. It is the least invasive approach with the lowest uncertainty as to its effects on gatekeepers and markets, which may suggest its desirability when concerns about the costs or collateral effects of gatekeeper liability loom large.⁷³ However, knowledge standards may be the hardest to police and may underdeter because of the ease with which gatekeepers may turn a blind eye or engage in tacit collusion with wrongdoers to subvert the duty. Gatekeeper liability under a knowledge

⁷⁰ See, e.g., Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 840–49 (1994).

⁷¹ See Kraakman, *supra* note 2, at 75–77.

⁷² See Espenosa, *supra* note 11, at 344–45 (discussing the concern that the employer sanctions regime would heighten discrimination against all individuals of perceived foreign origin).

⁷³ See Hamdani, *supra* note 2, at 104 (discussing how knowledge standards leave “gatekeepers with no incentives to scrutinize client conduct even when detecting misconduct is relatively easy”).

standard may run the risk of becoming a charade of “don’t ask, don’t tell” more than the formalist minimum of information.⁷⁴

Because each standard has both strengths and potential shortcomings, gatekeeper duties should be designed as narrowly as is consistent with advancing the enforcement objectives.⁷⁵ The more focused and clear the duty and compliance measures, the more confidently policymakers can rely on a strict liability or a negligence standard without fears of overdeterrence.⁷⁶ In contrast, the broader or more amorphous the duty, the more appealing a knowledge standard will be to mitigate dangers of overdeterrence and resulting cost-avoidance strategies or excessive precautions by gatekeepers.⁷⁷

2. Weighing the Costs and Benefits of Gatekeeper Liability

Whether gatekeeper liability is desirable turns on a balancing of the costs versus benefits. As discussed above, the imposition of gatekeeper liability necessarily entails a degree of uncertain costs and effects on gatekeepers and markets because of the under- or overinclusiveness of duty standards. But under any duty standard, gatekeepers will face heightened screening costs, the danger of residual liability, and decisions about whether and how to minimize liability exposure. Gatekeepers will understandably seek to pass on their compliance costs to their clients or customers to the degree that they can. To the extent to which demand for the category of good or service affected by gatekeeper liability is elastic, gatekeepers may have to stomach much of these costs and weigh whether continued participation in the

⁷⁴ *Cf. id.*

⁷⁵ See Kraakman, *supra* note 2, at 79–81.

⁷⁶ If a negligence and strict liability duty have the same deterrence value in a given context, then a negligence standard would be preferable because it would impose less costs than a strict liability standard. However, because all other things are rarely equal (except in the world of academic assumptions), in practice policymakers must choose between these standards and seek to take the resulting risks of over- or underdeterrence into account.

⁷⁷ See Jackson, *supra* note 2, at 1055–56.

market in whole or in part is profitable. If gatekeepers limit participation or exit markets, lawful actors who consume or provide gatekeepers' goods or services will be forced to bear the burdens.

Alternatively, to the extent to which demand is inelastic, then gatekeepers would seek to pass these costs on to their clients. Market participants will be subject to an implicit tax of higher fees to cover compliance costs and to indemnify gatekeepers from any residual liability. While gatekeeper clients could try to mitigate these costs by producing evidence of their lawful intentions, this information may be costly and in some cases may not even be possible to produce. Policymakers will have to weigh the burdens that these duties may impose on a wide set of market participants with the enforcement gains both in deciding whether to impose gatekeeper liability and what level of sanctions to impose.

The sanctions level is also essential for providing gatekeepers with credible incentives for compliance. However, policymakers' limited information about gatekeeper responses and their limited ability to oversee gatekeeper compliance makes sanction-setting a question with no easy or uniform answer. Ordinarily, policymakers attempt to force wrongdoers to internalize the costs of their actions by setting the expected value of a sanction to the social cost of wrongdoing.⁷⁸ But forcing gatekeepers who fail to fulfill their duty to bear all of the resulting social costs inflicted by primary wrongdoers could impose high costs and lead to significant distortions of markets, which could make the cure worse than the disease of wrongdoing.⁷⁹ It may be equally hard to define what the social harm is; in areas such as immigration enforcement, the discussion

⁷⁸ See *id.* at 1062.

⁷⁹ Cf. Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 564–66 (1988) (arguing that policymakers should not focus on the social cost of wrongdoing in setting sanctions on third parties).

as to the extent of the harm is at the center of a polarizing debate.⁸⁰ For these reasons, the focus should be on two factors: the ability of gatekeepers to detect the wrongdoing and the benefits gatekeepers receive from the goods or services that they demand or sell. Policymakers should ideally seek to make the expected value of sanctions that gatekeepers face from noncompliance higher than the costs of compliance plus residual liability. At the same time, these costs must not be so high that the expected value of sanctions exceeds the profitability of the activity for gatekeepers.⁸¹ Otherwise, gatekeepers may decide to exit the market or to engage in discrimination against suspect classes that include law-abiding actors.

This is a difficult balancing act and these uncertainties make setting the level of sanctions imprecise at best.⁸² Because policymakers' knowledge is most limited at the time gatekeeper regimes are first enacted, setting broad sanction ranges may provide flexibility for courts or public enforcers to gauge gatekeeper responsiveness and to adjust sanctions accordingly. This approach may be particularly appealing where there is a single enforcement body that has the statutory authority to assess the impact of a gatekeeper regime and to adjust the sanctions in a uniform way. This solution will not necessarily overcome risks of under- or overdeterrence and raises dangers of selective enforcement, although it does offer a way to overcome some of the uncertainties surrounding the enlistment of gatekeepers.

Determining the full costs of gatekeeper liability is difficult, but the social benefits may also be very hard to pin down. Politicians and policymakers often posit enforcement objectives,

⁸⁰ See, e.g., Martin S. Flaherty, *Rights, Reality, and Utopia*, 72 *FORDHAM L. REV.* 1789, 1805 (2004); Michelle Rae Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 *N.Y. INT'L L. REV.* 29, 52–55 (2003).

⁸¹ The more heterogeneous gatekeepers are, the harder it is to calculate the impact of sanctions. See Jackson, *supra* note 2, at 1052–53. For example, profit margins vary widely by industry and within sectors of industry, and sanctions that may drive one set of market participants out may have a minimal effect on others.

⁸² See Kraakman, *supra* note 2, at 76.

which may not have a readily quantifiable value.⁸³ Even when there are concrete numbers to debate, raw enforcement outcomes may prove to be poor, or at the very least contentious, measuring sticks of success.⁸⁴ For example, decisions to prosecute some types of offenses, such as prostitution, may turn more on a moral judgment than on quantifiable factors about the social benefits of enforcement efforts, such as reducing the spread of sexually transmitted diseases.⁸⁵ In other cases, such as securities fraud, policymakers may be able to calculate some of the social costs and benefits with greater precision, but determinations on optimal enforcement levels may ultimately rest on policymakers' assumptions about the relative costs and benefits.

For this reason, weighing the social costs and benefits may be contentious in any given gatekeeper context. Despite the fact that social costs and benefits and the optimal level of sanctions may be hard to calculate with precision, policymakers should not abandon the use of gatekeepers. This point does, however, suggest that enlisting gatekeepers would be most appealing in contexts where public enforcers simply cannot police against wrongdoing on their

⁸³ See, e.g., Michael Chertoff, Homeland Sec. Sec'y, Remarks at the Houston Forum (Nov. 2, 2005), available at <http://www.dhs.gov/dhspublic/display?theme=44&content=4920> (asserting that two key objectives of border control effects are preserving national security and "the rule of law").

⁸⁴ For example, in the immigration context politicians frequently point to the rising numbers of undocumented aliens detained in the Mexican border region as a sign that American enforcement efforts are bearing fruit. See, e.g., President George W. Bush, Radio Address to the Nation (Oct. 22, 2005), available at <http://usinfo.state.gov/gi/Archive/2005/Oct/24-735450.htm>. But in truth, increasing numbers of apprehended undocumented aliens may tell a very different story: that the incentives of illegal immigration to the United States continue dramatically to outweigh the deterrence value of enforcement, and thus spur increasing levels of illegal immigration.

⁸⁵ At first glance, it might appear strange to think of prostitution as an offense that could be regulated by a gatekeeper regime. But one need only open up the yellow pages to see how prostitution is no longer relegated to the underground economy, but instead exists in the open under euphemisms such as escort services or adult entertainment. Imposing negligence-based or strict liability on yellow pages and online directories for serving as intermediaries for these services may help to reduce access by casual users and the young, who may be the most vulnerable to contracting sexually transmitted diseases. Yet the value of this type of enforcement would ultimately not turn on a balancing test of social benefits, but rather on a moral perspective on the merits of targeting vice that may judge enforcement well worth the tradeoffs because of its symbolic value, even if the administrative, gatekeeper, and market costs far outweighed the concrete social benefits.

own because the primary wrongdoers cannot be detected (except perhaps at prohibitive costs) or are unresponsive to the threat of sanctions. In these cases, the choice may be abandonment of enforcement entirely or accepting that enforcement may entail significant costs and uncertainties and therefore attempting to tailor gatekeepers' duties in as narrow a way as is consistent with advancing the enforcement objectives.

The other significant factor that remains to be considered is an issue that the literature has largely overlooked: the challenge of overseeing gatekeeper compliance. Even the best-designed gatekeeper regime is bound to fail if gatekeepers can evade oversight, and all of the other cost and benefit calculations hinge on the ability of enforcers to sustain credible monitoring of gatekeeper compliance. For this reason, part II will explore the limits of public oversight of gatekeepers and the potential for private actors to fill this critical enforcement gap.

II. THE POTENTIAL FOR PRIVATE MONITORING OF GATEKEEPERS

A. The Merits of Private Oversight of Gatekeepers

1. The Appeal of Private Monitoring

Much of the literature on gatekeeping appears to posit that public enforcers are capable of overseeing gatekeepers on their own and thus largely overlooks the potential or need for private enforcers.⁸⁶ It is true that much of the appeal of gatekeepers lies in the fact that they offer a way to outsource enforcement functions in whole or in part. However, enlisting gatekeepers does not eliminate the oversight challenge for public enforcers because it merely shifts the locus of public enforcers' monitoring responsibilities. Although gatekeepers may in theory be more responsive to sanctions than the primary wrongdoers, they may also be as or more capable of intentionally

⁸⁶ See, e.g., Kraakman, *supra* note 2, at 75 (arguing that "the least important costs [in designing a gatekeeping regime] are likely to be the highly visible administrative expenses of detecting and prosecuting wayward gatekeepers").

or unintentionally avoiding public oversight. Monitoring gatekeepers may well be beyond the capabilities of public enforcers for similar reasons that public enforcers may be unable to detect and prosecute the primary offenders.⁸⁷

In the case of specialized expertise, such as from medical, legal, and accounting professionals, the gatekeepers may be best positioned to detect prospective wrongdoers.⁸⁸ But this same expertise may empower gatekeepers to conceal wrongdoing from public enforcers' eyes and make gatekeeper compliance extraordinarily difficult to monitor.⁸⁹ For example, doctors may be best positioned to discern that patients want prescription drugs for illicit purposes, but may just as easily accept or manufacture "symptoms" that justify granting a prescription, and public enforcers are ill-equipped to oversee this doctor-patient interaction. In other cases, such as the employment of illegal immigrants, the number of businesses that may employ undocumented aliens may be almost as numerous as the eleven million undocumented aliens.⁹⁰ Although it may be easier to track corporate entities than individuals, the enforcement burden is staggering and appears well beyond the capacity of any set of public enforcers.

⁸⁷ Public enforcers may fail to oversee gatekeepers for a wide range of reasons. *See, e.g.,* J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1454–55 (2003) (discussing how government agencies may not fulfill their mandates because public officials may be "lazy, uninterested, under-resourced, [or] overburdened"); Stephenson, *supra* note 7, at 110–11 (discussing how private enforcers may overcome enforcement slack by public agencies, due to political pressure, enforcers' sloth or inaction, or lobbying); Thompson, *supra* note 7, at 191–92 (discussing how political considerations, institutional structures, and lack of resources may compromise public enforcement efforts).

⁸⁸ *See supra* Part I.A.2.

⁸⁹ *See* Schwarcz, *supra* note 21, at 18–20 (discussing how the complexity of a broad range of transactions makes it difficult for anyone to detect fraud).

⁹⁰ There are 6.5 million registered employers in the United States, which does not include employers who operate exclusively in the underground economy. *See* OFFICE OF THE INSPECTOR GEN., SOCIAL SECURITY ADMINISTRATION, A-08-5-25023, SOCIAL SECURITY NUMBER MISUSE IN THE SERVICE, RESTAURANT, AND AGRICULTURE INDUSTRIES 9 (2005), *available at* <http://www.ssa.gov/oig/ADOBEPDF/A-08-05-25023.pdf>.

The case for using private actors to monitor gatekeepers is strongest in the context of chronic enforcement failures that have overwhelmed public enforcers and undercut their credibility, such as the large-scale efforts to combat drug trafficking and illegal immigration. Where time and experience have demonstrated the limits of public efforts to oversee gatekeepers and wrongdoers, this fact may provide both a compelling reason and political opportunity for exploring the potential of private alternatives.⁹¹

Other features that may suggest the desirability of private enforcement tools include the potential for large-scale fraud due to both the nature of the activity and the sociology of criminal networks. If the danger for fraud by tacit collusion or corruption by gatekeepers is significant because the offense can be easily concealed, then a sole reliance on public enforcement may be wishful thinking that gives gatekeeper liability little teeth. A related concern turns on the sociology of criminal networks as culturally and linguistically based networks may be far harder for public enforcers to penetrate on their own, if they can effectively oversee them at all. This point would be especially true both for drug and human trafficking and smuggling networks that tend to work through homogeneous groups and use the threat of violence within ethnic communities to command silence.⁹²

Private oversight appears particularly attractive in the context of gatekeepers who create the demand for primary wrongdoers' services. Because this type of gatekeepers' economic viability

⁹¹ This is the classic rationale for experimenting with the privatization of state functions. Privatization always poses the risk of exacerbating the situation, but the real or perceived exhaustion of public alternatives is often the political catalyst for exploring what private alternatives have to offer. See, e.g., Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2148 n.175 (2005) (considering benefits of market water allocation); S.L. Rundle, *The Once and Future Federal Grazing Lands*, 45 WM. & MARY L. REV. 1803, 1832–33 (2004) (advocating private ownership of federal grazing lands).

⁹² See Sadruddin et al., *supra* note 26, at 382–84. While policymakers might point to prosecutions of mob groups as signs of the potential for public enforcement under such harsh conditions, even these successes largely turned on the efficacy of private informants and wrongdoer turncoats rather than public enforcers acting on their own.

may turn on their suppliers' cost-saving illicit activities, gatekeepers may face overwhelming incentives to turn a blind eye to, or to actively collude with, wrongdoers. In competitive markets, entire industries may feel all but compelled to use illicit suppliers as a means to bend the rules to ensure cost competitiveness.⁹³ For example, if some firms in an industry employ Chinese or Indonesian suppliers who violate human rights and bribe local officials to keep costs low, then their competitors face high pressures to engage in similar practices.⁹⁴ Given how intertwined the incentives of gatekeepers and suppliers may be, it would hardly be surprising that corporations may end up investing far more in covering their tracks to subvert the Foreign Corrupt Practices Act, rather than in fulfilling gatekeeper duties. Private enforcers who have an insider view on these business relationships, such as employees of the corporation, competitors, or even the illicit suppliers themselves, may be in far better positions to expose this type of fraud than public enforcers.

Gatekeepers who are goods or service providers may also face significant temptations to facilitate illicit activity. These incentives would be most prominent, especially in the short run, in contexts where prospective wrongdoers formed a significant share of a gatekeepers' business that cannot easily be replaced.⁹⁵ Serving prospective wrongdoers rather than legitimate

⁹³ See, e.g., OFFICE OF THE INSPECTOR GENERAL, *supra* note 90, at 2 (discussing a Social Security Administration study that found that forty-eight percent of Social Security number filings by agricultural employers did not match SSA records).

⁹⁴ U.S. multinational companies may be liable for subsidiaries' violations of the Foreign Corrupt Practices Act if the parent company has knowledge, is willfully blind, or consciously disregards acts of bribery committed by their subsidiaries. See Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2000); Brown, *supra* note 40, at 29–35. Outsourcing production to independent companies in countries with widespread corruption, such as China, is designed to subvert the substance of compliance with the law. See Peter S. Goodman, *Common in China, Kickbacks Create Trouble for U.S. Companies at Home*, WASH. POST, Aug. 22, 2005, at A1 (discussing how U.S. companies face high pressure to pay bribes in China because they are standard business practices).

⁹⁵ See Coffee, *supra* note 2, at 322–23 (discussing how auditing firms as a whole may have a broad set of clients, but arguing that individual auditors who serve a large client such as Enron effectively have their economic interests interconnected with a single client); see also Jeffrey N. Gordon, *What Enron*

customers may also appear more appealing if they offer higher compensation that reflects the higher margins that may be earned from illicit activity and more than offsets the risks that gatekeepers may assume.⁹⁶ In these contexts, enlisting private monitors may be valuable in uncovering illicit relationships between gatekeepers and their clients because of how closely their interests intertwine.

2. The Broad Features of Private Oversight

Private enforcement tools have both strengths and weaknesses compared to public monitoring of gatekeepers. Each type of private oversight tool has its own distinctive merits and shortcomings that will be discussed in depth in the next section. This section's focus is on the broadly shared features of these tools.

First, enlisting private monitors may allow public enforcers to achieve mandates within limited manpower and budget constraints. Private insiders are likely far better positioned than public enforcers to uncover information on gatekeeper violations in a more cost-effective way.⁹⁷ Private monitors may have incentives to innovate new ways to uncover gatekeeper violations or to prosecute gatekeepers because they personally internalize the monitoring costs and monetary rewards in ways that public monitors do not.⁹⁸ Although some may feel that appeals to

Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections, 69 U. CHI. L. REV. 1233, 1237–38 (2002) (discussing how gatekeepers who provide a given client multiple types of services outside of their gatekeeper duty could face indirect incentives to compromise their compliance measures).

⁹⁶ See Kraakman, *supra* note 2, at 69–70 (noting that in theory wrongdoers can offer bribes up to the expected value from their wrongdoing, but in practice the difficulties of negotiation make it unlikely that wrongdoers can make credible commitments to that high a level of bribes).

⁹⁷ See Thompson, *supra* note 7, at 224–26 (discussing how interested citizens may be far better positioned than public enforcers to monitor environmental compliance).

⁹⁸ See Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1403–04, 1438–39 (1998) (discussing how private litigants have pursued the most challenging and significant discrimination cases); Stephenson, *supra* note 7, at 112–13 (suggesting how private litigants may employ novel strategies and approaches to expand enforcement potential); Thompson, *supra* note 7, at 206–09 (discussing how environmental groups made supplemental

mercenary motives are inconsistent with American civic virtues, in many contexts there may be no other way to provide adequate incentives for gatekeeper compliance.

The primary downside of private oversight techniques is also their strength: the responsiveness of private actors to financial incentives. Because private actors can be expected to respond to financial incentives so long as the expected value of rewards exceeds the risks and costs of their monitoring, reporting, or enforcement,⁹⁹ private oversight and particularly private enforcement actions may serve as a blunt tool that poses dangers of over- or underenforcement in any given context.¹⁰⁰ Putting aside potential exceptions such as the role of environmental groups in citizens suits,¹⁰¹ we can safely assume in most contexts that private actors' decisions about disclosing information or initiating an action about gatekeeper compliance will turn almost exclusively on their private benefits from these actions.¹⁰² Private actors will not take into

enforcement projects aiding the local environment a condition of citizen suit settlements, an approach the Department of Justice has subsequently embraced). Empowering private monitors may be a two-edged sword, however, as private monitors may also have incentives to find ways to engage in fraud against gatekeepers to extract rewards. Alternatively, private litigants may develop novel enforcement strategies that may expand the scope of enforcement well beyond its intended scope or may set precedents that hamstring subsequent public or private enforcers. See Jeannette L. Austin, Comment, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U. L. REV. 220, 222–23 (1987) (discussing how citizen suits may force judges to engage in judicial lawmaking to define regulatory requirements that may siphon regulatory power away from administrative agencies).

⁹⁹ See Mark A. Cohen & Paul H. Rubin, *Private Enforcement of Public Policy*, 3 YALE J. ON REG. 167, 175–76 (1985).

¹⁰⁰ See Stephenson, *supra* note 7, at 117–20 (discussing how private enforcement may disrupt cooperative relationships between regulators and regulated entities, dictate enforcement agendas, and eliminate possibilities for discretionary enforcement).

¹⁰¹ In the case of environmental groups and other ideologically oriented organizations, the ability to achieve their goals, to raise societal awareness, and to gain publicity for fundraising through citizen suits may make enforcement decisions in their self-interest even if the expected value of any suit that they pursue is negative. The noneconomic aspirations of ideologically oriented groups do not neatly fit into economic models for predicting what level of incentives can induce a given degree of enforcement activity. See Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 137–39 (2002).

¹⁰² See Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 578 (1997) (arguing that private litigants sue for compensation or relief and “not chiefly, if at all, to deter socially undesirable behavior in the future”).

account the broader social costs and benefits or public values at stake from information disclosure or decisions on whether and how to litigate.¹⁰³ Therefore, using private monitors by definition entails risks of over- or underinvestment of resources in any given context of oversight. For example, the economic incentives of private actors may be to pursue decisions to go to trial or to settle cases in contexts where broader public objectives would be best served by other approaches. For this reason, policymakers must seek to align the economic interests of private monitors in disclosing information or prosecuting gatekeepers as closely as possible with public enforcement objectives to guard against risks of over- or underdeterrence.

Second, private oversight often entails a tradeoff between the value of uncovering private information and the inefficiencies of enlisting uncoordinated private actors.¹⁰⁴ If public enforcers can uncover insider information about gatekeeper violations on their own in a cost-effective way, it may be more efficient for them to do so because public actors could coordinate investigations and prosecutions to minimize wasteful overlap of efforts. Given the shortcomings of public enforcement, policymakers may have to risk the inefficiencies of overlapping monitoring by private actors to gain access to insider information on violations. Public enforcers could mitigate this risk of inefficiency in some cases by enlisting informants on a regular basis and coordinating their activities. However, when the goal is to enlist a very broad pool of

¹⁰³ See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1314–20 (2003) (discussing the challenges of enlisting private actors to perform public functions while attempting to ensure that private actors uphold the values that public law seeks to promote). At the same time, public enforcers may not take social benefits fully into account or act on them at all as enforcers may be ignorant of the social cost and benefits at stake or be motivated by other factors such as minimizing time and resources spent on cases, as occurs routinely in plea bargaining. See, e.g., Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1962–68 (2005) (arguing that prosecutors often make the efficient resolution of cases, rather than justice, the focus of criminal prosecutions by routinely using pretrial detention as a means to pressure defendants into swiftly making guilty pleas).

¹⁰⁴ See Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 616–17 (2005); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 431–32 (1982).

potential monitors it would be far more effective in terms of costs and outcomes to give private actors the incentives to come forward with information or a suit when gatekeeper violations occur.

Third, it is difficult to determine the optimal level of rewards for private monitors. Too high or low a reward may lead to over- or underdeterrence and either fail to provide gatekeepers with adequate incentives for compliance or encourage wasteful harassment tips or suits or fraud by insiders.¹⁰⁵ Enforcers must balance the need to create sufficient incentives for private oversight with concerns about how these incentives may attract excessive private enforcement. If generous rewards elicit dubious or frivolous claims on a large scale, they may impose wasteful burdens on gatekeepers in fending off these claims, on courts in addressing victim suits and qui tam claims, and on public enforcers in responding to informant tips. The challenge is that reward setting may at best constitute an educated guess based on subjective judgments or assumptions about the worth of a given tip or of the degree of culpability or liability that a gatekeeper must bear for the primary wrongdoers' illicit acts.

A fourth set of tradeoffs concerns the social and cultural impact from using private monitors. Cultivating a mercenary zeal to oversee gatekeeper compliance may create atmospheres of distrust within communities and chill interaction within firms, because anyone might be a potential informant or saboteur of compliance.¹⁰⁶ Private oversight may push wrongdoing further underground and lead violators to resort to threats or violence to deter

¹⁰⁵ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 656–57 (1998).

¹⁰⁶ This point should not be overstated as anyone currently could be an uncompensated whistleblower at any time. The issue is whether adding mercenary motives for whistleblowing could have a more corrosive effect on relationships.

potential private monitors.¹⁰⁷ Public enforcers who cannot effectively enforce the laws on their own may be even less capable of protecting the private monitors they seek to enlist.¹⁰⁸ The threat of violence or retaliation may make prospective private qui tam litigants or informants less likely to assist the government and may therefore make a private monitoring approach fall short of its goals. Policy design can only seek to mitigate these tradeoffs as social costs and the risks of private retaliation may be unavoidable. Although private oversight tools share many of these traits, each tool entails distinctive challenges and tradeoffs that merit further elaboration.

B. Four Approaches to Private Monitoring

Public enforcers may enlist four main types of private enforcers to monitor gatekeeper compliance. First, parties directly harmed as a result of a gatekeepers' action or inaction may be empowered to sue gatekeepers for compensation. Second, private actors may be enlisted as qui tam litigants, serving as private attorney generals in exchange for a percentage of the damages. Third, public enforcers may use private informants to gain intelligence on gatekeeper compliance from insiders, competitors, or members of the community. Lastly, public enforcers may offer clemency and other forms of compensation to the primary wrongdoers to come forward and uncover gatekeeper violations.

¹⁰⁷ See FRANCIS T. MIKO, *TRAFFICKING IN WOMEN AND CHILDREN: THE U.S. AND INTERNATIONAL RESPONSE*, CONG. RES. SERV. (2002), available at <http://fpc.state.gov/documents/organization/9107.pdf> (discussing the use of violence by human smugglers to silence undocumented aliens or coerce payments).

¹⁰⁸ For example, the failure of public enforcers to protect cooperating witnesses from threats of violence suggests that public enforcers who are not in a position to detect violations may be no more capable of guarding the private enforcers that they solicit. See, e.g., William Glaberson, *'Lie or Die' Aftermath of a Murder; Justice, Safety and the System: A Witness is Slain in Brooklyn*, N.Y. TIMES, July 6, 2003, at A1 (discussing the failure of the criminal justice system to protect a voluntary witness in a murder/drug-related case).

1. The Limited Potential for Victim Suits

The most conventional approach for enlisting private oversight would be to create a private cause of action for parties who are directly harmed as a result of a gatekeeper's failure to uphold her duty. Statutes have granted private causes of action to victims who can prove concrete harms in many other settings¹⁰⁹ and, in many instances, courts have found implicit private causes of action in legislation.¹¹⁰ The appeal of this approach is intuitive: parties who may be harmed by the primary wrongdoers have the powerful incentive of self-interest to monitor gatekeeper compliance and to prosecute gatekeepers for compensation when gatekeepers' action or inaction allowed the primary wrongdoers to inflict harm. These suits would serve to compensate victims for the wrongs they have suffered and simultaneously serve to deter gatekeepers from future violations.¹¹¹ Specific acts, such as the Racketeer Influenced and Corrupt Organizations Act and the antitrust Clayton Act, provide for treble damages to magnify the deterrence effect of victim suits.¹¹² Similarly, class action lawsuits offer the potential to consolidate victim claims and compensation process without having to involve public enforcers at all.¹¹³

¹⁰⁹ See, e.g., Federal Torts Claim Act, 28 U.S.C. § 2674 (2000); Civil Rights Act of 1964, 42 U.S.C. §§ 1981, 2000 (2000); Americans with Disabilities Act, 42 U.S.C. § 12101 (2000).

¹¹⁰ See, e.g., *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971) (recognizing a private cause of action for individuals for encroachments on their federal statutory or constitutional rights by federal agents); *J.I. Case Co. v. Borak*, 377 U.S. 426, 430–31 (1964) (finding an implied private cause of action under section 14(a) of the Securities Exchange Act of 1934). But see *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (calling for courts to “adhere[] to a stricter standard for the implication of private causes of action”).

¹¹¹ See Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 556–558 (1981) (discussing the deterrence role that victim suits may play).

¹¹² See, e.g., Clayton Act, 15 U.S.C. § 15(a) (2000); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 (2000).

¹¹³ See John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 222–23 (1983) (arguing that private class-action suits can complement public enforcement by raising the financial consequences of wrongdoing to levels far above any fees that public enforcers are able or willing to impose).

Private causes of action may make perfect sense when a wronged party seeks to be made whole by suing the wrongdoer who caused the injury.¹¹⁴ The political appeal of empowering victims to sue gatekeepers may be clear, though this approach is more problematic in practice and may have limited enforcement value. Holding gatekeepers jointly and severally liable with the primary wrongdoers for all of the costs that wrongdoers inflict following failed gatekeeping could easily overdeter.¹¹⁵ From both a culpability and cost standpoint, the liability of the gatekeeper should turn on her ability to guard against the harm inflicted by the primary wrongdoer and the gatekeeper's ability to profit from the activity, rather than on the actual harm the primary wrongdoer inflicted on the victim. Otherwise, gatekeepers may choose to exit or reduce their exposure to markets because the potential liabilities of providing their goods or services may far exceed the benefits. It may also prove difficult to delineate the percentage of the harm that rests on the gatekeeper's shoulders for failing to live up to her duty. For example, a negligent doctor may prescribe prescription drugs to a patient who feigned the symptoms, but holding the doctor financially liable for all acts that the drugged-up patient may commit might appear outrageous and likely to overdeter.¹¹⁶

A more significant problem with this approach is that victims of primary wrongdoers may have an economic interest in pinning the blame on gatekeepers (especially if the gatekeepers have deep pockets and wrongdoers cannot be apprehended or are judgment-proof). But the

¹¹⁴ The logic that a wrongdoer who inflicted an injury should restore victims to their state prior to the injury is an underlying premise of tort law. See A. Mitchell Polinsky & Steven Shavell, *Should Liability be Based on the Harm to the Victim or the Gain to the Injurer?*, 10 J. L. ECON. & ORG. 427, 427 (1994).

¹¹⁵ The exception would be in cases where a conspiracy existed between the primary wrongdoers and the gatekeeper, thereby making the gatekeeper fully implicated in any wrongdoing that occurred pursuant to the conspiracy.

¹¹⁶ The degree of liability to which a gatekeeper is exposed may turn on the extent of their complicity with the wrongdoing. For example, if a gatekeeper entered into a conspiracy with the wrongdoer, then she would be liable for all acts that are reasonably foreseeable from the underlying conspiracy. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2004). In contrast, holding a merely negligent gatekeeper liable for all acts that a wrongdoer performed would seem far more unjust.

victims may be no better and may often be worse positioned than public enforcers to uncover information about whether gatekeepers failed to live up to their duties.¹¹⁷ In cases where victims are part of the community with gatekeepers or the primary wrongdoers, they may have cost-effective access to information on gatekeeper compliance. However, this advantage may at least partly be offset by greater exposure to risks of retaliation or injury by the gatekeepers or the primary wrongdoers.

But in cases where victims are far removed from gatekeepers, victims may enjoy no cost advantage over public enforcers in uncovering gatekeeper noncompliance. Victims may be in a far worse position than public enforcers in these contexts because they lack access to public tools of investigation and may have no countervailing access to insider information on gatekeeper compliance.¹¹⁸ This point is particularly significant if gatekeeper compliance is difficult to monitor because of the nature of the interaction between gatekeepers and potential wrongdoers. For this reason, relying on private causes of action alone to heighten enforcement may end up having only a marginal impact because the insiders best placed to monitor gatekeepers, such as employees, competitors, or even the primary wrongdoers, would likely not be involved in this type of action.

Nonetheless, private causes of action for victims may still be a valuable complement or substitute for public enforcement if the goal is to heighten enforcement levels in cases in which gatekeeper violations are easy to detect and the government lacks the resources to detect and prosecute these violations on its own. But aside from picking the low-lying fruit of

¹¹⁷ See Bucy, *supra* note 7, at 59–60. But see Stephenson, *supra* note 7, at 108 (arguing that people directly affected by a potential defendant’s conduct may be in the best position to detect violations).

¹¹⁸ Unless we grant victims broad leeway to conduct “fishing expeditions” by using discovery against gatekeepers to uncover evidence of wrongdoing, a victim suit approach may end up being hamstrung by the problem that we started with: the difficulties of monitoring gatekeeper compliance.

enforcement,¹¹⁹ victims may often be no better positioned than public enforcers to gather information on violations. There are also many public enforcement contexts where there is no concrete harm against an identifiable subset of people, or the harm against the public is diffuse and difficult to calculate.¹²⁰ In these contexts, turning to other types of private enforcers who may have a more direct connection to the gatekeepers may offer a more viable alternative for uncovering gatekeeper noncompliance.

2. *The Potential for Qui Tam Litigation*

In contrast to victim suits, a qui tam approach would provide incentives for any private party to serve as an overseer of gatekeeper compliance. Qui tam provisions allow any citizen to enforce specific areas of federal law in return for a reward or a percentage of fines levied from successful prosecutions.¹²¹ This approach serves as the ultimate outsourcing of enforcement

¹¹⁹ In many cases victims may do little more than duplicate public enforcers' efforts or try to build off of public enforcers' efforts by filing suits that mirror the action taken or knowledge disclosed by public enforcers. See, e.g., John F. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681 (1986) (discussing how "in the field of antitrust enforcement, [] private antitrust class actions have tended to piggyback on a prior governmental proceeding").

¹²⁰ Possession of illegal drugs, pornography, prostitution, and illicit gambling constitute examples of "victimless" crimes that, nonetheless, arguably concern public interests such as public morals or health and safety. See Anthony M. Dillof, *Criminal Law: Unraveling Unlawful Entrapment*, 94 J. CRIM. L. & CRIMINOLOGY 827, 872 n.167 (2004).

¹²¹ Citizen suits are closely related to qui tam litigation and empower private citizens to enforce specified laws in return for lawyer's fees and other expenses. However, citizen suits appear a far less effective enforcement tool than qui tam litigation because all penalties from citizen suits go to the federal government, and standing requirements limit the pool of prospective plaintiffs. Citizen suit provisions have been primarily used to augment public enforcement of environmental laws. See, e.g., Toxic Substances Control Act, 15 U.S.C. § 2619 (2000); Clean Water Act of 1976, 33 U.S.C. § 1365 (2000); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (2000); Noise Control Act of 1972, 42 U.S.C. § 4911 (2000); Clean Air Act, 42 U.S.C. § 7604 (2000). While ideological groups, such as environmental organizations, may advance their agendas and heighten their public profile through citizen suits, nonideological plaintiffs face an expected loss of value from litigation, since at best they can recoup their attorney's fees and expenses. See Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 356 (1990). In contrast, qui tam suits' offer of monetary awards may attract a wide range of plaintiffs, which may enhance overall enforcement and the law's popular legitimacy. Citizen suit plaintiffs must also establish injury-in-fact and redressability to establish standing to sue. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102–03 (1998); see also *Lujan v. Defenders of Wildlife*,

functions by vesting enforcement discretion in the hands of “private attorney generals.”¹²² Although qui tam suits once were the norm for law enforcement,¹²³ now the False Claims Act is the notable exception in enlisting private litigants to police federal contract fraud.¹²⁴

The False Claims Act provides a valuable model for the design of qui tam provisions and their potential efficacy.¹²⁵ The Act integrates elements of both a private informant and a qui tam system. Qui tam litigants must file a complaint in federal court that is sealed for sixty days, during which time even the existence of the suit is not disclosed to the defendant.¹²⁶ The litigant must simultaneously disclose to the federal government “substantially all material evidence and information” about the claims.¹²⁷ By the end of the sixty-day period, the United States can choose to assume control of the case and effectively transform the qui tam litigants into

504 U.S. 555, 560–61 (1992). In contrast, qui tam plaintiffs appear to have standing if they have the prospect of a reward, “even if only a peppercorn.” *Steel Co.*, 523 U.S. at 127 (Stephens, J., concurring). Lastly, citizen suits may be brought only if the violation is ongoing, *id.* at 109, or the issue is not moot at the time the suit was initiated. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 187–88 (2000). Because the other features of citizen suits are substantially similar to qui tam litigation, this discussion will focus solely on the merits of qui tam litigation.

¹²² See Morrison, *supra* note 104, 590 (noting that “the term [private attorney general] denotes a plaintiff who sues to vindicate public interests not directly connected to any special stake of her own”).

¹²³ Qui tam actions have long been a feature of English and American law enforcement, but since the early nineteenth century public enforcement has almost completely replaced this tool. For an overview of the history of qui tam suits in the United States and United Kingdom respectively, see J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 540–55 (2000); Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 456–50 (1998).

¹²⁴ See False Claims Amendments Act of 1986, 31 U.S.C. § 3729–33 (2000).

¹²⁵ The False Claims Act was originally enacted to enlist private attorney generals to combat federal contract fraud during the civil war. But by the 1940s concerns arose over the potential for abuse and blackmail, which led to restrictions on the ability to make qui tam claims and a dramatic decline in qui tam litigation. See Beck, *supra* note 123, at 560–61; Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 296–304 (1989). The 1986 Act significantly expanded the scope of qui tam litigation by empowering individual litigants to bring suit even if the information was already available in the public record. The 1986 Act also made it easier for litigants to establish government fraud by lowering the required mens rea for the crime from purposive intent to defraud the government to mere recklessness. See 31 U.S.C. § 3730(e)(4)(A) (2000); 31 U.S.C. § 3730(2) (4)(A)–(B) (2000).

¹²⁶ See 31 U.S.C. § 3739(b)1–2(b) (2000), § 3730(b)(1)–(2) (2000).

¹²⁷ See 31 U.S.C. § 3730(b)(2)–(3) (2000).

informants.¹²⁸ If the government successfully prosecutes the case, then it must award the qui tam plaintiff's litigation costs and attorney's fees, as well as fifteen to twenty-five percent of the penalties.¹²⁹ If the government chooses not to assume control of the case, litigants may successfully pursue the case on their own, and receive twenty-five to thirty percent of the damages as well as litigation costs and attorney's fees.¹³⁰

The results of these incentives for qui tam actions speak for themselves. Since 1986, the federal government has recovered over \$13.5 billion from federal contract fraud cases under the False Claims Act.¹³¹ Qui tam litigants have received over \$1.4 billion of the proceeds.¹³² It is unclear how much of this fraud the federal government could have uncovered and prosecuted on its own (assuming the government both possessed and dedicated enforcement resources towards this end). But regardless of this fact, the amount recovered suggests that prospective qui tam litigants can and will augment public enforcement if the level and probability of rewards are sufficiently high.¹³³

¹²⁸ See 31 U.S.C. § 3730(4)(A) (2000).

¹²⁹ See 31 U.S.C. § 3730(d)(1) (2000).

¹³⁰ If the qui tam suit is based on publicly disclosed information or the litigant's actions contributed to the wrongdoing, then the successful litigant will receive less than these percentages. See 31 U.S.C. § 3730(d)(1)–(3) (2000).

¹³¹ In 2003 alone, qui tam actions resulted in the collection of \$2.1 billion, and from 1986 to 2004 qui tam litigation resulted in the federal government's recovery of \$13.5 billion and qui tam litigants' receipt of \$1.4 billion. See Press Release, Dep't of Justice, Justice Department Civil Fraud Recoveries Total \$2.1 Billion for FY 2003; False Claims Act Recoveries Exceed \$12 Billion Since 1986 (Nov. 10, 2003), available at http://www.usdoj.gov/opa/pr/2003/November/03_civ_613.htm; THE FALSE CLAIMS ACT LEGAL CTR., FRAUD STATISTICS OVERVIEW 1 (2005), <http://66.98.181.12/newsources/fcastatsfy2004.pdf>.

¹³² See THE FALSE CLAIMS ACT LEGAL CTR., *supra* note 131, at 1.

¹³³ A side effect of a qui tam system is that it serves as an employment program for the plaintiffs bar, as entire law firms exist simply to enforce the qui tam provisions of the False Claims Act. See, e.g., Phillips & Cohen LLP, <http://www.phillipsandcohen.com>.

Qui tam suits came into being because of the inadequacies of public enforcement,¹³⁴ and reviving qui tam litigation in contexts where the government cannot adequately monitor gatekeepers is consistent with its original *raison d'être*. In qui tam litigation, private plaintiffs with cost-effective access to information on gatekeeper compliance may be expected to file enforcement actions if the expected returns exceed their costs of investigation, prosecution, and potential retaliation. In contrast, an overburdened agency, such as the IRS, may lack the ability to act even if the tips from private informants are literally right on the money. Victim suits could perform a similar role to the extent victims have cost-effective access to information on gatekeeper compliance, but broadening the pool of potential litigants to all private actors may significantly enhance monitoring levels. In qui tam suits, as in victim suits, plaintiffs must bear the costs of their investigation and litigation, which may help to deter frivolous suits. The use of a “loser-pays” principle with a qui tam provision could heighten these incentives even more to weed out harassment suits that are designed merely to extract a settlement from gatekeepers.¹³⁵

Although empowering qui tam litigants may dramatically increase monitoring of gatekeepers, these enforcement gains come with significant tradeoffs. One cost is the potential overlap of public and private enforcement efforts, which may entail wasteful redundancies. The False Claims Act attempts to mitigate this danger by creating a sixty-day window for public enforcers to review suits and to decide whether to assume control of the case.¹³⁶ This approach

¹³⁴ See Beck, *supra* note 123, at 565–66, 601; Paul E. McGreal & Dee Dee Baba, *Applying Coase to Qui Tam Actions Against the States*, 77 NOTRE DAME L. REV. 87, 120 (2001) (describing qui tam actions as “creatures of necessity” for the early American government because of its public enforcement limitations).

¹³⁵ See Robert Brookins, *Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric*, 59 ALB. L. REV. 1, 51 n.250 (1995) (arguing that the incorporation of a loser-pays principle may significantly reduce frivolous lawsuits).

¹³⁶ The danger exists that the government will assume control of qui tam litigation in order to scuttle it because of illicit collusion with the targeted gatekeepers. But the track record of False Claims Act litigation suggests that qui tam litigants received compensation far more often when the government

coordinates public and private enforcement efforts only after the case is filed and may miss wasteful overlap of public and private enforcement energies before this time. But the risks and costs of overlapping efforts may be a necessary evil for the enforcement gains from enlisting qui tam litigants. Another social cost that may be all but impossible to eliminate would be social waste caused by multiple private parties' attempting to monitor the same gatekeepers.¹³⁷ The fact that under the False Claims Act the case is not disclosed until sixty days after it is filed may simply exacerbate the danger of wasteful overlap of private monitoring.

Another potential shortcoming of qui tam litigation is that it may largely take enforcement decisions out of public enforcers' hands.¹³⁸ Much of public enforcement turns on discretionary judgments by public enforcers.¹³⁹ Although discretionary powers may be abused, they empower public enforcers to contextualize legal requirements and to show flexibility and mercy when it may be desirable. In contrast, private enforcement is a blunt tool, and the danger exists that qui tam litigants will engage in wasteful litigation to extract the most for themselves, when public

assumes control of the case than when it does not. *See* Bucy, *supra* note 7, at 51 & n.290 (noting that qui tam litigants received significantly less compensation when litigating completely on their own than when the government participated in the case). This fact suggests that qui tam litigants have an interest in alerting public enforcers about the scope of their investigation and findings, which may mitigate the possibility of a significant overlap of public and private oversight of gatekeepers.

¹³⁷ Sunstein, *supra* note 104, at 431–32 (noting this concern of overlapping enforcement efforts in the § 1983 context).

¹³⁸ Victim suits also take enforcement discretion out of the government's hands. But victim suit provisions generally limit standing to cases of actual harm to victims, while qui tam litigants would enjoy sweeping discretion to initiate actions in any case of alleged gatekeeper noncompliance.

¹³⁹ *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 25 (1969) (arguing that discretionary enforcement may be “indispensable for individualization of justice”). Discretionary enforcement allows leniency when a law appears overly inclusive or when its application would impose an injustice in a given case. Discretionary enforcement has its own shortcomings. Officials are often monopsonists of public enforcement and therefore must routinely prioritize enforcement efforts, even if mandatory enforcement rules are in place. They may exercise discretion in arbitrary or invidious ways or unconsciously misuse their powers of selective enforcement. *See, e.g.,* Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 981–89 (1997) (discussing how a range of motivations other than maximizing convictions may shape the exercise of prosecutorial discretion).

enforcers could resolve the case far more efficiently in ways that advance the public interest. It is possible to implement provisions similar to the False Claims Act to empower public enforcers to review and assume control of *qui tam* litigation to mitigate this danger.¹⁴⁰ However, overwhelmed and underfinanced public enforcers may often be equally ill-equipped to take control of cases even when there is a perceived need to intervene to temper enforcement.

A related danger is that *qui tam* litigants may employ litigation strategies that establish precedents limiting both future *qui tam* litigants and public enforcers.¹⁴¹ Private litigants may solely concern themselves with their private benefits, rather than the broader social benefits of deterrence of gatekeepers, and therefore may either under- or overinvest in enforcement in any given case.¹⁴² Public enforcers may not be in the position *ex ante* to know whether a particular case could lead to outcomes with lasting implications or even to take the time to assess the social benefits of government intervention or support of a given lawsuit. For these reasons, it may be best to use *qui tam* litigation in narrowly defined areas of enforcement where the merits of discretionary enforcement or public control of the litigation are low. This fact counsels using *qui tam* suits as complements to broader enforcement efforts, which may rely on other public or private means for other facets of enforcement.

¹⁴⁰ See 31 U.S.C. §§ 3730(b)(2)–(3) (2000).

¹⁴¹ While the danger of poor litigation leading to damaging precedents exists, this danger may be offset by *qui tam* litigants' innovative litigation strategies that may make it easier to uncover wrongdoing or to make successful claims. See Stephenson, *supra* note 7, at 112–13.

¹⁴² See Shavell, *supra* note 102, at 584–85 (arguing that the amount at stake for private litigants is only very loosely related to the social benefits of litigation and how it may be socially beneficial to invest more than the dollars at stake in the suit in cases where substantial deterrence may result and how in other contexts suits should not be brought at all if they may not result in any or much of a likelihood of reduced harm); see also Zinn, *supra* note 101, at 137–39 (noting that the interests of ideologically oriented plaintiffs may encompass a broader conception of the social benefits and costs than profit-driven plaintiffs).

3. *The Potential for Private Informants*

The use of private informants offers another way to provide public enforcers with insider information, yet to leave public enforcers in control of enforcement actions. Private informants function as profit-driven whistleblowers, who may dramatically enhance the government's monitoring ability yet whose potential use may inflict significant costs on gatekeepers and markets.¹⁴³ Monetary incentives may entice informants to provide invaluable leads that public enforcers otherwise could not acquire or could acquire only at prohibitive economic or social costs. However, these benefits come with potential risks of false claims to harass employers or secure revenge, risks of encouraging sabotage of gatekeeper compliance from within firms, and social costs that may erode relationships between corporate managers and employees and among co-workers.¹⁴⁴

Nonetheless, an incentive system for private informants offers several advantages over a qui tam litigant approach. The use of private informants allows public enforcers to heighten monitoring of gatekeepers while allowing public enforcers to maintain control of the power to prosecute. Because public enforcers may often be able to leverage informant tips to uncover wrongdoing without disclosing informants' identity, the same insiders may be able to monitor continuously gatekeeper compliance in ways that qui litigants or victims may not. However, informants need not put their money where their mouth is, as in victim suits and qui tam

¹⁴³ The term "private informant" admittedly also does not carry the best of associations. However, private informants have been routinely used in limited contexts as complements to public enforcement. See Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 647–51 (2004).

¹⁴⁴ The enlistment of informants may have chilling effects on interaction between employers and employees and between corporations and clients, as these actors may have incentives to minimize interaction and disclosures if they fear that information could be used against them at a later point. See Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221, 240–41 (1995).

litigation. For this reason, informants may be more likely to supply false information, which enforcers will need to screen out.

The federal government widely employs incentives for private informants to assist public enforcement efforts.¹⁴⁵ Prosecutors routinely use immunity or lower sanctions to secure cooperation from material witnesses and suspects in criminal and civil investigations.¹⁴⁶ Notices of public and private bounties for information leading to the arrest and conviction of specific individuals or types of criminals are ubiquitous fixtures at police stations, post offices, and on the evening news.¹⁴⁷

The Internal Revenue Service and Securities and Exchange Commission have long used incentives for private informants to combat tax and securities fraud, respectively.¹⁴⁸ In both contexts the agencies have limited personnel and face stark challenges in detecting fraud.¹⁴⁹ For example, in 2000 the IRS only audited about one in every 232 returns.¹⁵⁰ By the agency's own admission, staff reductions of one-sixth since 1992 forced the IRS to write off billions in unpaid

¹⁴⁵ See Russell L. Christopher, *The Prosecutor's Dilemma: Bargains and Punishments*, 72 FORDHAM L. REV. 93, 109 (2003).

¹⁴⁶ See *id.* at 97–102 (discussing the classic prisoner's dilemma that seeks to divide the interests of defendants by offering the first to cop a plea disproportionate rewards).

¹⁴⁷ See, e.g., Erik S. Lesser, *An Ex-Hostage Receives Her Reward*, N.Y. TIMES, Mar. 25, 2005, at A1 (noting that the former hostage whose call led to the arrest of courthouse murderer Brian Nichols received a \$70,000 informants' reward).

¹⁴⁸ See Insider Trading and Securities Fraud Enforcement Act, 15 U.S.C. § 78(u) (2000); Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. No. 101-647, 104 Stat. 4849 (1990); Treas. Reg. 301.7623-1(b)(2) (1999); I.R.S. Pub. No. 733 REWARDS FOR INFORMATION PROVIDED BY INDIVIDUALS TO THE INTERNAL REVENUE SERVICE (1997).

¹⁴⁹ For example from 1990 to 2000, the number of SEC enforcers increased by approximately sixteen percent, while the number of complaints grew one hundred percent. During this same period, the SEC reviewed in part or whole only eight percent of corporate filings, compared with twenty-one percent in 1991. See U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO-02-302, SEC OPERATIONS: INCREASED WORKLOAD CREATES CHALLENGES 13, 21–22 (2002).

¹⁵⁰ See *As Audits Decline, Fewer Taxpayers Balk at Cheating*, N.Y. TIMES, Jan. 19, 2002, at A11.

taxes.¹⁵¹ More recently, the IRS has tried to expand its enforcement capabilities,¹⁵² but its enforcers are still woefully few in number compared to the scale of their task.

The IRS offers rewards of one to fifteen percent of revenues recouped from tax evasion depending upon the agency's assessment of the usefulness of tips.¹⁵³ On average the agency receives over ten thousand tips each year from private informants concerning billions of dollars of alleged tax fraud.¹⁵⁴ The understaffed IRS may still lack the personnel to pursue these leads, but private informants' responsiveness to economic incentives suggests how this tool may form a valuable complement to public enforcement.

Private informants may enhance the information-gathering capabilities of enforcement agencies, especially when strong networks and connections between gatekeepers and the primary wrongdoers pose barriers to public monitoring. But one other challenge is that enforcement decisions may turn on varying combinations of tips from informant and public enforcement investigations, which makes reward setting difficult. One way to approach this problem is to employ agency discretion in setting rewards on a case-by-case basis, such as the IRS' informant system.¹⁵⁵ This discretionary approach may allow rewards to reflect the risks taken by the informant in securing and disclosing the information or the impact in uncovering wrongdoing.

¹⁵¹ See David Cay Johnston, *A Smaller I.R.S. Gives Up Billions in Back Taxes*, N.Y. TIMES, Apr. 13, 2001, at A1.

¹⁵² See, e.g., DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE, INTERNAL REVENUE SERVICE DATA BOOK 2005 ii (2006), available at <http://www.irs.gov/pub/irs-soi/05databk.pdf> (detailing how the IRS audited 1.2 million individual taxpayers in 2005); Mary Mosquera, *IRS, States Expand Efforts to Fight Money Laundering*, GOV'T COMPUTER NEWS, June 8, 2004, http://www.gcn.com/vol1_no1/daily.updates/26149-1.html.

¹⁵³ See Treas. Reg. § 301.7623-1(b)(2) (1999); I.R.S. Pub. No. 733 (1997).

¹⁵⁴ See Marsha Ferziger & Daniel Currell, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 1999 U. ILL. L. REV. 1141, 1167–68. This number is much smaller than what one might expect given the perceived pervasiveness of tax fraud. This figure may be explained by the fact that the informant program is not widely advertised or that prospective informants are reluctant to participate for fear of being exposed in the process or because the expected value of benefits are too low to justify the risks of being an informant.

¹⁵⁵ See Treas. Reg. § 301.7623-1(c) (1999); I.R.S. Pub. No. 733 (1997).

The downside is the lack of predictability may dampen informant participation rates. Informants may not be willing to undergo the risks of information gathering and disclosure without having greater certainty concerning the monetary value of the information they provide. The alternative approach is to fix the level of compensation for tips as a set percentage of enforcement outcomes to the extent this approach is feasible. This approach may make it easier for policymakers to attempt to set the desired level of enforcement and for prospective informants to decide whether the expected value of tips justifies the risks of uncovering the relevant information.¹⁵⁶ A “sweetener” approach that combines fixed rewards with discretionary incentives based on the circumstances of each case may offer the best balance of incentives to create clear expectations for informants.

Another challenge is that the anonymity of private informants is a two-edged sword. Anonymity may produce incentives for a higher level of informant participation and a greater number of tips. However, the ability of informants to levy their accusations privately may make them more likely to produce highly speculative or false tips to harass gatekeepers they are ostensibly monitoring. Private informant systems generally do not apply sanctions against informants for frivolous tips.¹⁵⁷ Public enforcers would face the potentially costly burden of screening out bona fide leads from false allegations, and the targeted gatekeepers would also bear the costs of fending off investigations based on erroneous allegations.

¹⁵⁶ The challenge with any informant system is that public enforcers may choose not to act on informants’ tips or settle with gatekeepers at steeply discounted sanctions or none at all. Informants’ compensation therefore will turn on public enforcers’ discretion even if compensation is linked to enforcement outcomes that stem from the tips. *See* Natapoff, *supra* note 143, at 681–82 (discussing how the rewards for informants turn on the discretion of police officers and prosecutors).

¹⁵⁷ This risk may be far less in the case of repeat player informants whose continuing interactions with public enforcers may produce incentives for providing credible information or allow public enforcers to gauge the authenticity of present tips in light of informants’ past reliability.

Private informant systems may also be inefficient because of overlapping search costs. If multiple private parties are engaging in search costs, there may be excessive private investment in policing gatekeepers and resulting social waste. If public enforcers coordinated with private informants this danger could be mitigated. The problem of overlapping searches would be more common and a necessary tradeoff in cases where private informants come to the government at their own accord and volunteer information for rewards. The use of informants may also be costly because government officials will need to invest resources in exploring the validity of tips, in weighing the value of their information in calculating rewards, and in making financial payments. While it may be harder to break down the full costs of public enforcers' uncovering a given amount of information, these costs dampen the benefits from private informants' tips.

Enforcers will also need to divert resources from monitoring and prosecuting gatekeepers towards protecting informants or suspected informants who may face retaliation from gatekeepers or other interested parties. In extreme cases where informants may face threats of violence, the need to protect informants may require a commitment to relocate informants and their families under a witness protection program. At minimum, the costs would entail providing financial and legal assistance for informants to uphold their rights against retaliation.

The use of private informants also entails significant social costs that caution towards its application in limited contexts. It may be socially desirable to use the threat of private informants to chill particular illegal acts, such as tax evasion and other financial actions that skirt the edges of legality. However, this chilling effect may make it harder for gatekeepers to perform their work by providing employers with incentives to minimize exchanges of information with clients, employees, or the general public for fear that disclosures could be used

against them.¹⁵⁸ This approach may make it more difficult for gatekeepers to acquiesce to or assist wrongdoing, but it may also chill lawful and socially valuable interaction between gatekeepers and other parties.¹⁵⁹ Using private informants may also have significant chilling effects on social interaction in the workplace and broader community, and therefore should only be used in narrow contexts where less invasive information gathering techniques have proven to be ineffective.

4. Enlisting Wrongdoers to Oversee Gatekeepers

Offering immunity and other incentives for the primary wrongdoers to report gatekeeper violations could serve as an ongoing, large-scale sting operation for overseeing gatekeepers. If the reward of clemency and additional financial rewards were high enough, public enforcers may be able to get primary wrongdoers to come to them to reveal gatekeeper violations.¹⁶⁰ This approach is a hybrid between the use of private informants and plea bargaining, because the underlying rationale for enlisting gatekeepers is that public enforcers may not be in a position to identify, apprehend, or prosecute primary wrongdoers in many contexts.¹⁶¹ Nonetheless, this

¹⁵⁸ See Painter, *supra* note 144, at 240–41.

¹⁵⁹ The widespread application of private informant systems may arouse understandable opposition from both liberals and libertarians who would see the specter of a “stasi state.” See Inga Markovits, *Selective Memory: How the Law Affects What We Remember and Forget About the Past—The Case of East Germany*, 35 LAW & SOC’Y REV. 513, 533 (2001) (discussing the “stasi,” the secret police for the former East German regime, which was notorious for relying extensively on private informers to police for dissent).

¹⁶⁰ These rewards must be substantial because cooperating wrongdoers may face intense social sanctions from their community, difficulty in finding employment, and other emotional hardships. See Bucy, *supra* note 7, at 61–62 (discussing the economic and social costs that whistleblowers may face).

¹⁶¹ See George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 46 (2000) (noting how rewards for cooperating witnesses may be necessary to convince them not to exercise their Fifth Amendment rights against self-incrimination).

approach has potential because primary offenders may have a substantial interest in coming forward to be made clean in the eyes of the law and to receive monetary rewards.¹⁶²

Who could be in a better position to know whether wrongdoing was taking place, what the gatekeeper knew of the wrongdoing, or how the gatekeeper conducted the oversight than the primary wrongdoers? The primary wrongdoers would likely not be able to look over an accountant's shoulders as she checked quarterly reports or to see whether a lawyer went through the proper due diligence checks for an initial public offering. But primary wrongdoers may be able to know firsthand what information the gatekeepers requested and be in the best position to produce evidence that wrongdoing was tacitly or explicitly tolerated. In cases where the interests of the primary wrongdoer and the gatekeeper are closely intertwined and difficult to monitor, the prospect of clemency and monetary gain may offer public enforcers the only way to uncover evidence of understandings that existed between gatekeepers and the primary wrongdoers.

At first glance, offering clemency and financial rewards to primary wrongdoers might seem to be turning enforcement objectives on their heads. The point of gatekeeper liability is ultimately to deter the primary wrongdoers, so why should wrongdoers be allowed to go free or profit from their wrongdoing while the gatekeepers may be left facing penalties? Even in a plea bargaining context, cooperating wrongdoers at best receive a clean slate and typically receive a reduced sentence. The logic here is that legitimizing some illicit activity may be an acceptable price to pay for the benefit of producing greater incentives for gatekeeper compliance. If the real or perceived probability of wrongdoers' blowing the whistle on gatekeepers and the resulting

¹⁶² Being granted clemency may be the most compelling interest for many primary offenders, because the multiplier effect of being clean in the eyes of the law may be far more valuable than any sum of money.

sanctions were high enough, then gatekeepers would respond by investing more in efforts to live up to their gatekeeper obligations and thus reduce levels of illicit activity in the long run.

The danger exists that this approach could become a farce of primary offenders receiving a “get out of jail free card” with additional sweeteners on a large scale for reporting gatekeepers. For this reason, tempering these incentives with a first to report provision offers several advantages. In conventional criminal plea bargaining, the first primary offender to cop the plea would receive clemency or disproportionate rewards, while those who plea later may get little save a moderately reduced sentence.¹⁶³ Although this approach admittedly poses the danger of soliciting false pleas and lying by defendants turned government witnesses, it offers strong incentives for disclosures of illicit activity. In the context of gatekeepers, the first offender to provide information substantially leading to the uncovering of wrongdoing by a gatekeeper should reap the bulk of the potential rewards based on the scale of wrongdoing that her information uncovers.¹⁶⁴

At the same time, we would not want to discourage other primary offenders from coming forward to present evidence of gatekeepers’ wrongdoing. All offenders may hold their tongues if they feel they could gain nothing if they are the second or third person to inform on gatekeepers and may actually risk much by disclosing their own culpability in the process. For this reason, other primary wrongdoers who produce evidence of a gatekeeper’s violations before the

¹⁶³ See Christopher, *supra* note 145, at 98–102.

¹⁶⁴ Much of criminal and civil enforcement literally consists of dangling carrots of clemency or reduced sentences to pit one defendant against another in order to reduce the time and costs expended on cases. See Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 714–17 (1988) (framing plea bargaining as an all-too-literal “prisoner’s dilemma”). What is distinctive here is the argument that offers of clemency and rewards should be awarded exclusively to primary wrongdoers with the goal of raising the costs of noncompliance for gatekeepers. Enforcers could do the opposite and offer rewards to firms who disclose primary wrongdoers. Although this approach might make primary wrongdoers more wary of whom they conduct business with, it might actually dampen the incentives for firm compliance as firms would only disclose violators if the benefits of disclosure outweighed the benefits of turning a blind eye.

gatekeeper's prosecution should receive qualified immunity or reduced sentences or fines for their own wrongdoing. At a minimum, cooperating wrongdoers should face sentences dramatically below levels set by the relevant sentencing guidelines or below the expected value of sentences that they would receive in conventional plea bargaining.¹⁶⁵

An additional advantage of enlisting primary wrongdoers as informants is that offering clemency and rewards to primary offenders may offer the only way to uncover illicit activity in the underground economy. Public enforcers who are unable to monitor gatekeepers in the above ground economy on their own may be completely inept at detecting gatekeepers functioning in the underground economy. By using incentives to enlist primary offenders, public enforcers may be able to target gatekeepers that they may never otherwise have known even existed. This approach may not only target existing gatekeepers in the underground economy, but also allow public enforcers to reduce the incentives for primary offenders and gatekeepers to go underground to sidestep gatekeeper liability.

One important caveat is that the appeal of this plea bargaining approach may turn on the nature of the targeted illicit activity. If the wrongdoing is *malum prohibitum* rather than *malum in se*,¹⁶⁶ this plea bargaining approach would be far more desirable and politically plausible. It might be palatable to have illegal immigrants inform on employers or even oxycontin addicts inform on doctors' making illicit prescriptions in exchange for clemency. In contrast, it might seem outrageous to reward contractors whose labor practices trample on human rights for

¹⁶⁵ This approach is consistent with the U.S. Sentencing Guidelines, which allow for downward departures from the Guidelines in cases of acceptance of responsibility, U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2004), or in cases where the government certifies that the defendant has provided substantial assistance to the government in developing cases against other defendants. *Id.* Since primary offenders would be eligible to receive these two benefits in the course of ordinary plea bargaining, significantly sweetening the incentives may be necessary to entice primary offenders to come forward.

¹⁶⁶ *Malum prohibitum* refers to "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." BLACK'S LAW DICTIONARY 978 (8th ed. 2004). *Malum in se* refers to "[a] crime or act that is inherently immoral . . ." *Id.*

reporting their American clients' negligence in failing to police them. The real line may be between primary offenders whose acts deeply offend the public and those who may only offend mildly if at all. For example, the public might not have quietly stood by if Kenneth Lay and his associates at Enron had escaped liability or even received rewards for successfully blaming negligent attorney or accounting gatekeepers.¹⁶⁷

The downside of this approach is that it would entail significant moral hazards (as would be true in any plea bargaining context). Wrongdoers by definition would have suspect credibility. Monetary incentives would give them ample reason to lie about gatekeeper compliance or to seek to entrap gatekeepers. Public enforcers may have to expend substantial resources assessing the credibility of wrongdoers' information as many may come forward for the promise of immunity. Additionally, gatekeepers will face high costs in defending against false claims, especially if there is not a clear set of compliance measures, such as a safe harbor of actions which gatekeepers can fulfill to comply with their duty.

Another danger is that gatekeepers may be tempted to collude with the primary wrongdoers for mutual profit. The cost of the sanction for gatekeepers must be high enough, such that primary wrongdoers may not simply pay off gatekeepers to take the fall in order for the primary wrongdoers to get clean or receive financial rewards. Otherwise, we might have a travesty of justice as crooks could literally launder their money and then report bank gatekeepers for laundering their money. In the process, money launderers might be able to make their money literally clean with a side payment going to the gatekeeper for their troubles and to cover any liabilities incurred in the process. The danger of collusion between gatekeepers and the primary

¹⁶⁷ See Alexei Barrieneuvo, *Two Enron Chiefs are Convicted in Fraud and Conspiracy Trial*, N.Y. TIMES, May 25, 2006 (discussing the convictions of former Enron chief executives Kenneth L. Lay and Jeffrey K. Skilling).

offenders would be significant in cases where the sanctions gatekeepers face are low. But the costs of collusion for gatekeepers may be higher than they first appear and mitigate this danger because of the collateral effects of gatekeepers' being caught. Gatekeepers may face escalating sanctions if they are repeat offenders and more importantly they may face a higher probability of scrutiny from public enforcers in this and unrelated areas, such as tax compliance.

Even if the expected value of sanctions were high enough that unscrupulous gatekeepers would not have the incentive to collude with wrongdoers, wrongdoers might exploit private informant provisions to target gatekeepers' deep pockets. By rewarding primary offenders who inform on gatekeepers, we may create incentives for more intricate efforts at deception by offenders that may make it harder and more costly for gatekeepers to fulfill their responsibilities. Concerted efforts by fraudulent wrongdoers to bilk gatekeepers may not necessarily be bad inasmuch as they paradoxically advance public ends by heightening incentives for gatekeepers to live up to their duties to screen for prospective wrongdoers.¹⁶⁸ This danger, however, does counsel against the use of strict liability standards to guard against this risk of fraud, at least unless there is a safe harbor of compliance measures. Otherwise gatekeepers would be forced to bear liabilities for fraud that they may lack any capability to detect (or only at prohibitive screening costs) and imposing liability in that type of context would entail social waste.¹⁶⁹

C. Assessing the Costs and Benefits of Using Private Monitors

This discussion has highlighted how the use of private actors to monitor gatekeeper compliance may dramatically enhance the government's ability to uncover and prosecute gatekeeper violations. But it has also suggested how private oversight tools entail costs that defy

¹⁶⁸ See *infra* Part IV.A.1-2 (discussing how fraudulent sting operations by undocumented aliens or qui tam litigants may paradoxically serve public ends by heightening pressures for employer compliance with their verification duties).

¹⁶⁹ See Hamdani, *supra* note 2, at 104.

easy calculation, which should make policymakers pause before embracing these enforcement tools on a large-scale.

Victim suits entail the least costs but offer the prospect of the least benefits. Empowering victims may not be as invasive on gatekeepers as empowering *qui tam* litigants or informants and therefore avoid the social costs they may inflict. But this virtue is also the shortcoming of this approach as victims likely enjoy no informational advantage over public enforcers and, in fact, lack the tools that public enforcers possess to monitor gatekeeper compliance.¹⁷⁰ The primary appeal of victim suits is that they may fill enforcement roles in cases where public enforcers lack the resources to prosecute and the information on gatekeeper violations is readily available.¹⁷¹

The vice and virtue of the other private oversight tools, such as *qui tam* suits, informants, or cooperating wrongdoers, is their potential invasiveness and the economic and social costs that they may inflict in order to achieve their enforcement ends. The most troubling costs that private monitors would entail are the social costs that are difficult to quantify. Some of these costs already exist because gatekeepers face the risk that at any time employees or primary wrongdoers could go to the authorities and accuse gatekeepers of failing to comply with their duties.¹⁷² The principal difference is one of degree because adding financial incentives could significantly enhance the number of monitors and the probability that insiders would monitor

¹⁷⁰ In theory, victims could offer bounties to insiders for exposing gatekeepers' wrongdoing. Because the value of a suit against the gatekeepers may be quite valuable to victims, they may be able to offer substantial incentives for information that far exceed those offered by public authorities. The downside of this approach is that insiders may be vulnerable to retaliation by the gatekeepers or to the danger of civil or criminal liability for their participation in gatekeeper violations or the targeted wrongdoing. In contrast, public enforcers would be able to offer more credible assurances or clemency to cooperating insiders that their information would not be used against them.

¹⁷¹ These enforcement gains are partly offset by the possibility of frivolous suits and fishing expeditions through discovery imposing wasteful burdens on courts and raising costs on gatekeepers, which they may seek to pass on to the market actors that they provide or demand services.

¹⁷² The Sarbanes-Oxley Act recognized the value of insider whistleblowers by strengthening their legal protections. *See* 18 U.S.C. §§ 1513(e), 1514A(a)(1)–(2) (Supp. 2002) (laying out the whistleblower protections for the Sarbanes-Oxley Act of 2002).

gatekeeper compliance. This may have a chilling effect on business relations because every customer or community could be a potential litigant, and could harm workplace environments because bosses and workers may be concerned about potential turncoats in their midst.

Gatekeepers who do no wrong may in theory have nothing to fear. However, the reality of gatekeeper liability is more complicated because even compliant gatekeepers may face greater costs if insiders and primary wrongdoers may profit from reporting on their alleged violations. In an ideal world private monitors would only report actual gatekeeper violations, but the profit motive may provide incentives to make baseless allegations. Worse still, insiders may have the incentives and the means to sabotage gatekeeper compliance through their actions or inaction, so that others may report the violations and they in turn may receive a kickback for their troubles. Gatekeepers would face costs in defending themselves against false allegations. They may also have incentives to overinvest in compliance by building in redundancies of internal oversight to ensure that their employees are complying with gatekeeper obligations and not subverting compliance efforts. These costs may cause gatekeepers to limit exposure or exit the markets. Either way gatekeepers' clients may be forced to foot the bill by either having reduced access to services or by facing higher costs that gatekeepers will seek to pass on them to the extent that they can.

Private monitoring of gatekeepers may dramatically enhance the ability to detect and prosecute gatekeepers who fail to live up to their duties. However, the costs private monitoring may inflict are significant and build on the other cost concerns with gatekeeper liability which were laid out in part I.¹⁷³ For these reasons, policymakers should exercise caution in enlisting this oversight approach, and their greatest appeal may be in cases where public enforcers are

¹⁷³ See *supra* Part I.B.2.

otherwise unable to oversee gatekeeper compliance. As part III will explore in depth, immigration enforcement poses this type of difficult enforcement challenge where private monitoring of gatekeepers may be well worth the costs and risks.

III. THE CASE OF IMMIGRATION ENFORCEMENT

A. Placing Immigration Enforcement in Context

1. An Overview of the Immigration Enforcement Challenge

Immigration enforcement offers a stiff test both of the potential of gatekeepers and the desirability of using private monitors to oversee gatekeeper compliance.¹⁷⁴ The challenges of policing illegal immigration have overwhelmed decades of public enforcement efforts.¹⁷⁵ The federal government annually spends billions of dollars on policing borders and other ports of entry,¹⁷⁶ and a myriad of laws claim to threaten illegal immigrants with civil and criminal penalties.¹⁷⁷ However, the low probability of enforcement, the lack of available sanctions

¹⁷⁴ As noted earlier, immigration enforcement is only one facet of the larger question of immigration reform whose full scope this article has neither the space nor the ability to address. Instead, this article seeks to expand the parameters of one dimension of this debate by suggesting how the use of private monitors to oversee employer compliance offers a politically viable and economically feasible way to heighten immigration enforcement.

¹⁷⁵ See, e.g., Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1, 6–7 (1997) (discussing how extraordinary expansions of resources spent on border control have failed to stem increasing levels of illegal immigration); Eric Lipton, *Homeland Security Chief Tells of Plan to Stabilize Border*, N.Y. TIMES, Aug. 24, 2005, at A11 (quoting Homeland Secretary Michael Chertoff as saying “[w]e have decided to stand back and take a look at how we address the problem [of illegal immigration] and solve it once and for all. The American public is rightly distressed about a situation in which they feel we do not have the proper control over our borders.”).

¹⁷⁶ While politicians periodically engage in political grandstanding over immigration issues, they have largely engaged in the politics of symbolism and sidestepped the difficult issues surrounding immigration reform. See, e.g., Kevin R. Johnson, *Law and the Border: Open Borders?*, 51 UCLA L. REV. 193, 262 (2003) (arguing that politicians have incentives to appear “tough on immigration,” regardless of whether policies work, in order to reap short-term political gains); Manns, *supra* note 31, at 145–50 (discussing how proposals for the formal abolition of the INS not only failed to address the substantive problems facing immigration policy, but also lowered the profile of immigration issues, as the two successor sub-agencies would have less clout and visibility than the INS).

¹⁷⁷ See, e.g., 8 U.S.C. § 1325 (2000) (making first time offender undocumented aliens guilty of a misdemeanor with up to 6 month prison sentence and \$500 fine or both); 8 U.S.C. § 1227 (2000)

against undocumented aliens except for deportation,¹⁷⁸ and the ease of reentry through porous borders make illegal entry a matter of “when” rather than “whether.”¹⁷⁹ The Bureau of Immigration and Customs Enforcement lacks the funds, personnel,¹⁸⁰ and above all the ability to monitor the vast networks of citizens, legal aliens, and undocumented aliens that facilitate illegal immigration.¹⁸¹

(specifying a number of conditions for which undocumented aliens may be deported, such as violating visa terms or entering without inspection).

¹⁷⁸ The government’s routine use of deportation (or voluntary repatriation, which aliens often ignore in practice) has very limited deterrent value because of the ease of reentry. The federal government rarely resorts to criminal sanctions because the legal, detention and imprisonment costs of resorting to criminal proceedings would be prohibitive if the federal government consistently treated illegal immigration as criminal acts. See U.S. Gov’t Accountability Office, GAO-05-822T, IMMIGRATION ENFORCEMENT: PRELIMINARY OBSERVATIONS ON EMPLOYMENT VERIFICATION AND WORKSITE EFFORTS 17–18 (2005) [hereinafter PRELIMINARY OBSERVATIONS], available at <http://www.judiciary.house.gov/media/pdfs/stana062105.pdf> (noting how the Homeland Security Department lacks the resources and facilities even to detain most undocumented aliens who are apprehended until a deportation hearing can be held).

¹⁷⁹ Most enforcement efforts are concentrated on ports of entry, particularly on the Mexican border region, see Charles J. Ogletree, Jr., *America’s Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 768 (2000), which may raise the cost of entry for prospective aliens and redirect border crossings to more remote areas. Enforcement efforts largely overlook the millions of undocumented aliens who reach the American interior or overstay legal visas and thereafter face only a minute probability of detection. Conservative estimates hold that twenty-five to forty percent of undocumented aliens (approximately 2.5 to 4 million people) have overstayed their legal visas. See JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS, BACKGROUND BRIEFING PREPARED FOR TASK FORCE ON IMMIGRATION AND AMERICA’S FUTURE 9 (2005), available at <http://pewhispanic.org/files/reports/44.pdf>; see also JAMES G. GIMPEL & JAMES R. EDWARDS, THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM 12–13 (1999) (estimating that about half of undocumented aliens overstayed legal visas).

¹⁸⁰ Although the federal government has taken tentative steps towards enlisting state and local governments as enforcers, this effort appears token at best, as the total number of state officers trained by the federal government remains only in the hundreds. See April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1155–59 (2004).

¹⁸¹ The lack of funds, personnel, and inability to manage or oversee immigration flows has been a problem plaguing immigration enforcement for decades. See, e.g., H.R. REP. NO. 103-216, THE INS OVERWHELMED AND UNPREPARED FOR THE FUTURE 1–5 (1993) (discussing the INS’ inability to address growing levels of illegal immigration); Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. PITT. L. REV. 409, 410 n.7 (1983) (discussing a 1980 General Accounting Office Report that found the Immigration and Naturalization Service ill-equipped and underfinanced); McKenzie, *supra* note 180, at 1164 (discussing how the Bureau of Immigration and Customs Enforcement is “severely understaffed and simply lacks the manpower for proper immigration enforcement”).

Over twenty years ago the federal government tacitly recognized its inability to address this problem on its own by attempting to enlist employers as gatekeepers to confirm the immigration status of their employees.¹⁸² This approach acknowledged the economic roots for most illegal immigration,¹⁸³ but failed to comprehend the scope of the challenge that employer demand for undocumented alien labor would pose for creating an effective gatekeeper regime. The fundamental problem is that both employers of low-wage workers and undocumented aliens share a strong economic interest in engaging in formal compliance yet substantive subversion of the verification process. Mutual self-interest has served as a powerful incentive for implicit or explicit collusion and obfuscation. The Bureau of Immigration and Customs Enforcement has proven so incapable of overcoming these obstacles to monitoring employers for good-faith compliance that it has largely abandoned enforcement efforts.¹⁸⁴

¹⁸² See Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.). This approach once symbolized an innovative attempt at reform. See, e.g., Kathleen M. Johnson, *Coping With Illegal Immigrant Workers: Employer Sanctions*, 1984 U. ILL. L. REV. 959, 961 (arguing that the pending employer verification system would be “both effective and fair” in deterring illegal immigration). But see R. Paul Faxon, Comment, *Employer Sanctions for Hiring Undocumented Aliens: A Simplistic Solution to a Complex Problem*, 6 NW. J. INT’L L. & BUS. 203, 204–07 (1984) (arguing that employer verification proposals do not address the underlying problems that create pressures for illegal immigration).

¹⁸³ See 8 U.S.C. § 1364(b)(3) (2000).

¹⁸⁴ The lack of effective oversight coupled with flaws in the design and implementation of the verification system undermined the gatekeeper regime and made the probability of liability near zero. A broad literature has documented the failures of the employer sanctions system and the virtual abandonment of enforcement efforts in this area by the INS and its successor, the Bureau of Immigration and Customs Enforcement. See, e.g., U.S. COMM’N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 50–76 (1994) (documenting the failures of the employer verification system); Espenosa, *supra* note 11, 347–48 (arguing that the employer verification regime has failed to reduce illegal immigration, yet “succeeded” in heightening discrimination against citizens and legal aliens of foreign origin); Medina, *supra* note 11, at 688–95 (showing how the employer verification system has failed to reduce the employment of undocumented aliens and to deter illegal immigration). But see Stephen H. Legomsky, *Employer Sanctions: Past and Future*, in THE DEBATE IN THE UNITED STATES OVER IMMIGRATION 171, 171–78 (Peter Duignan & L.H. Gann eds., 1998) (arguing that the employer verification system may have had some impact in deterring illegal immigration and asserting that levels of illegal immigration may have risen even more quickly but for the existence of this system).

This part will show how the enlistment of private monitors to oversee employers may fill oversight gaps by providing access to insider information on gatekeeper compliance and increasing levels of enforcement to heighten incentives for employers to engage in good faith compliance.¹⁸⁵ It will show how private actors may be well situated to produce information on whether employment violations are taking place at dramatically lower economic and social costs than public enforcers.¹⁸⁶ It will suggest how the government may enlist undocumented aliens as de facto sting operation agents and empower competitors, employees, and other members of the communities to serve as informants or act as qui tam litigants to monitor gatekeeper compliance on an ongoing basis.

This part will also suggest other related reforms to make gatekeeper compliance more swift and cost-effective and to mitigate incentives for discrimination against legal aliens and citizens of foreign origin which heightened monitoring of employers may create. It will show how recent legislative proposals to expand electronic access to work authorization databases and recently enacted enhanced protections for driver's licenses may provide employers with a cost-effective

¹⁸⁵ Surprisingly little attention has been paid to the question of the potential to privatize aspects of immigration enforcement. One notable author to touch on the subject is Peter Schuck, who has explored the potential for privatizing the monitoring of released aliens who are awaiting deportation hearings. See Peter H. Schuck, *INS Detention and Removal: A "White Paper,"* 11 GEO. IMMIG. L.J. 667, 682–85 (1997). Elsewhere, Peter Schuck considers another variant of privatization in laying out a proposal for the “out-sourcing” of refugee and asylum functions from developed countries to developing countries through an auction system. See PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 293–325 (1998). But the broad potential for the privatization of immigration enforcement remains a largely untapped area of scholarship.

¹⁸⁶ In some cases public enforcers could acquire this same information, but at the price of prohibitive economic costs and social disruption. This point was illustrated by the widespread questioning and detentions of Arab immigrants in the wake of the September 11th attacks. Administration officials may claim the strategy of questioning and detaining large numbers of Arab men was a success in acquiring information on potential terrorist activities and on the immigration status of large numbers of Arab-Americans. However, the heavy-handed enforcement approach may have had a poisonous effect on Arab-American relations with police and American society for countless years to come, ultimately creating greater problems than this strategy “solved.” See DAVID COLE, *ENEMY ALIENS* 47–56 (2003).

and accurate means of confirming employees' identities.¹⁸⁷ Although private oversight could significantly enhance enforcement under almost any duty standard, this part will show how imposing a negligence standard or strict liability standard coupled with safe harbor of compliance measures may offer the best incentives for compliance. Lastly, this proposal will suggest how strengthening substantive protections for discrimination against legal individuals of foreign nations may offset risks of overdeterrence. Although this proposal entails significant costs and tradeoffs, it offers a cost-effective and politically viable way to overcome the obstacles facing immigration enforcement.

2. The Nature of the Enforcement Challenge

Deterring illegal immigration into the United States is an admittedly herculean task that would challenge even the most well-crafted policies.¹⁸⁸ The United States is not alone in this effort as other developed countries have also struggled over the past generation in attempting to limit increasing flows of undocumented aliens.¹⁸⁹ However, no other country's challenges compare to those posed by the over 500 million people who pass through U.S. borders every year.¹⁹⁰ Each year, the undocumented alien population increases by approximately 700,000

¹⁸⁷ See Real I.D. Act of 2005, Pub. L. No. 109-13, §§ 202–07, 119 Stat. 231 (2005); H.R. 4437, 109th Cong. §§ 701, 702 (2005); S. 2611, 109th Cong. §§ 274A(d), 274A(e) (2006).

¹⁸⁸ Approximately eleven million undocumented aliens permanently live in the United States, and this figure increases by about 700,000 people each year. JEFFREY S. PASSEL, PEW HISPANIC CTR., ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 1–2 (Mar. 21, 2005), *available at* <http://pewhispanic.org/files/reports/44.pdf>. Undocumented aliens add an estimated seven to eight million workers to the labor force, and this number increases when one factors in seasonal employment. *Id.* at 3–4.

¹⁸⁹ See *generally* CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE (Wayne A. Cornelius et al. eds., 1994) [hereinafter CONTROLLING IMMIGRATION] (assessing efforts to curtail illegal immigration in a cross-section of developed countries).

¹⁹⁰ See U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 182, at 9.

people,¹⁹¹ and an estimated eleven million undocumented aliens permanently live in the United States.¹⁹²

The push and pull factors that surround illegal immigration make this a complex problem. Push factors include social, economic, and political conditions in immigrant-sending countries,¹⁹³ such as high birth rates and limited economic opportunities. Pull factors include the economic opportunities and political freedoms of the United States.¹⁹⁴ As importantly, interfamilial and ethnic networks provide both incentives and opportunities to immigrate, and they form mediating structures for new immigrants to enter into the labor market and society.¹⁹⁵ Any agency would be hard-pressed to oversee the overwhelming numbers of undocumented aliens and to counter the strength of these factors. However, the shortcomings of American enforcement strategies have made a difficult task appear impossible.

The challenge of illegal immigration is that the push and pull factors combine to make most illegal immigrants both determined to enter the United States and virtually judgment-proof. Prospective immigrants are willing to spend large sums and to take tremendous risks in entering

¹⁹¹ PASSEL, *supra* note 186, at 2. This number approximately equals the 800,000 new permanent residents that enter the United States each year. See Schuck, *supra* note 173, at 4.

¹⁹² PASSELL, *supra* note 186, at 2.

¹⁹³ Schuck, *supra* note 173, at 6.

¹⁹⁴ Globalization and enhancements in transportation and communication have combined to make more people cognizant of vast economic disparities and capable of pursuing new opportunities through illegal immigration. The United States may be a particularly appealing destination because of America's reputation as an accommodating culture and historical openness to immigration.

¹⁹⁵ See, e.g., Matthew W. Finkin, *From Anonymity to Transparency: Screening the Workforce in the Information Age*, 2000 COLUM. BUS. L. REV. 403, 408, 409 n.24 (2000) (noting how employers in low-wages industries rely on immigrant networks to spread word of job openings); Richard C. Jones, *Macro-Patterns of Undocumented Migration Between Mexico and the United States*, in PATTERNS OF UNDOCUMENTED MIGRATION: MEXICO AND THE UNITED STATES 33, 43–49 (Richard C. Jones ed., 1984) (documenting the flow of undocumented aliens from villages to U.S. towns and cities from which earlier village residents have relocated in the short or long term); see also Massey, *supra* note 25, at 68–70 (discussing the role that social and familial networks play in facilitating legal and illegal immigration).

the United States. In contrast, the costs for public enforcers to detect, detain, and repatriate undocumented aliens are prohibitive.¹⁹⁶

One of the greatest challenges in overseeing illegal immigration is that it often operates through homogenous networks.¹⁹⁷ Initial influxes of legal and undocumented aliens have created ethnic networks that have facilitated subsequent illegal immigration.¹⁹⁸ Pioneer aliens come to the United States legally or illegally and pave the way for their family, friends, and

¹⁹⁶ See RAJEEV GOYLE & DAVID A. JAEGER, CTR. FOR AM. PROGRESS, DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT 1 (2005), *available at* http://www.americanprogress.org/ATF.CF/%7BE9245FE4-9A2B-43C7-A521-5D6FF2E06E03%7D/Deporting_the_undocumented.pdf (estimating that it would take \$41 billion a year over five years just to apprehend, detain, and deport the undocumented aliens currently in the United States).

¹⁹⁷ Illegal immigration patterns are consistent with patterns of legal immigration from the first settlements in British North America to the present. Pioneers from a given ethnic group paved the way and encouraged and assisted others from their community to follow in their footsteps. For much of U.S. history, the lines between legal and illegal immigration were amorphous at best, and benign neglect encouraged these types of immigration flows. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1841–84 (1993) (discussing how prior to 1875 most immigration restrictions were state-based and focused on concerns with crime, poverty, disability, and contagious disease). Nativist impulses shaped restrictions on Chinese immigration, *see, e.g.*, Naturalization Act of July 14, 1870, ch. 254, 16 Stat. 254 (1870); Chinese Exclusion Act, ch. 126, § 1, 22 Stat. 58 (1882) (repealed 1943), and more comprehensive immigration legislation in 1924 primarily targeted Eastern European immigration. See Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (repealed 1965). But it is noteworthy that benign neglect characterized immigration from the Western Hemisphere until after World War II. See GEORGE J. BORJAS, HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY 38 (1999).

¹⁹⁸ See Philip L. Martin, *The United States: Benign Neglect toward Immigration*, in CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE 83, 89 (Wayne A. Cornelius et al. eds., 1994) (noting that “most of today’s migration streams have their origins in the colonial or labor recruitment policies of industrial countries”). For example, one of the great ironies of immigration policy is that large-scale influxes of undocumented aliens began with the termination of the nation’s only experiment with a temporary employment program for low-skilled workers. The Bracero program brought four to five million temporary Mexican workers to work in U.S. agriculture between 1942 and 1964. See PHILIP MARTIN, CTR. FOR IMMIGR. STUD., THERE IS NOTHING MORE PERMANENT THAN TEMPORARY FOREIGN WORKERS 1 (2004), *available at* <http://www.cis.org/articles/2001/back501.pdf>; *see also* RICHARD B. CRAIG, THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY 5 (1971). Following the program’s abrupt termination, undocumented aliens continued to follow existing employment patterns and served as linkages for subsequent intrafamilial and intra-ethnic immigration. See KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 152–59 (1992). Illegal immigration streams from other regions, such as Central America and Asia, have followed similar patterns.

extended networks to enter the United States.¹⁹⁹ The tight intra-ethnic nature of many of these networks and the fact that layers of citizens, legal aliens, and undocumented aliens are involved in facilitating illegal immigration have made it extremely difficult for enforcement officials to oversee and to close off channels for illegal immigration.²⁰⁰

In spite of these challenges, the nature of illegal immigration patterns also creates opportunities for heightened enforcement. Because of geographical proximity, immigration patterns from Mexico and Central America form more of a two-way flow than illegal immigration from other parts of the world.²⁰¹ It is estimated that sixty percent of undocumented aliens come from Mexico and another twenty percent from Central America.²⁰² Thus, a large majority of undocumented aliens are likely to be highly responsive to changed incentives within the United States or their home country.²⁰³

¹⁹⁹ While the initial migrant may have come legally, the long waits that can number in years and the high costs of immigration processes may make illegal immigration an attractive option, even for family reunification.

²⁰⁰ Martin, *supra* note 196, at 89–93.

²⁰¹ This fact reflects the seasonal nature of work in agriculture, construction, and other fields with high concentrations of undocumented alien employees, as well as economic conditions in Mexico and other nearby countries.

²⁰² See B. LINDSEY LOWELL & ROBERTO SURO, PEW HISPANIC CTR., HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.-MEXICO MIGRATION TALKS 7 (2002), <http://www.pewhispanic.org/files/reports/6.pdf>.

²⁰³ In contrast, undocumented aliens from East Asia or the Middle East have endured much higher costs to gain passage to the United States and therefore may be much less responsive to incentives to return to their country of origin. However, one irony of America's focus of enforcement resources on the Mexican border is that many itinerant workers who would return home after their seasonal work is complete have now become full-time residents in the United States because of fears of not being able to make it back to the U.S. if they go home. *Id.* at 8–10.

B. The Limits of Public Enforcement Tools in Addressing Illegal Immigration

Public enforcers have repeatedly demonstrated that they lack both the tools and the means to address illegal immigration on their own.²⁰⁴ Decades of failed policing of American borders and the American interior suggest intrinsic limits in the federal government's enforcement approaches and the need to consider new ways to enlist gatekeepers and other private actors to fill the glaring gaps in public enforcement. Although the attempt to enlist employers as verifiers of immigration status has been part of this story of failure, the shortcomings of this approach largely reflect the limits of public oversight that plague other areas of public enforcement.

Politicians have relied on highly visible and costly policing of the Mexican border region and other ports of entry as political cover to suggest they are addressing the problem.²⁰⁵ However, decades of dramatic increases in border patrol resources and personnel have failed to stem the tide of increasing levels of illegal immigration and have exposed the limits of a perimeter policing strategy.²⁰⁶ The determination, ingenuity, and sheer numbers of illegal

²⁰⁴ Space constraints dictate that I can only touch upon the limits of public enforcement strategies, which each can and have entailed articles and books in themselves. But suggesting the theoretical and practical limits of these approaches is important for underscoring the need for enlisting private actors to address the challenges posed by immigration enforcement.

²⁰⁵ Targeting ports of entry and border regions produces large numbers of detections and deportations. Politicians can then highlight concrete evidence of high numbers of apprehensions or prevented entry to show interested constituents that they are dealing with the problem of illegal immigration. See Johnson, *supra* note 176, at 262. Highly visible enforcement actions along portions of the Mexican border have redirected undocumented aliens away from the most populated areas and have thus helped to dampen political pressure for more comprehensive enforcement efforts. See Sam Howe Vchovet, *Tiny Stretch of Border, Big Test For a Wall*, N.Y. TIMES, Dec. 8, 1997, at A1 (highlighting targeted enforcement efforts in the San Diego and El Paso border regions).

²⁰⁶ From 1993 to 2004, the federal government increased annual spending on border enforcement by a factor of five, from \$740 million to \$3.8 billion, and almost tripled the ranks of the Border Patrol, from nearly 4000 to just under 11,000 agents. See Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 STAN. L. & POL'Y REV. 445, 455 (2005). During this same period the illegal immigration population has more than doubled to eleven million. PASSEL, *supra* note 186, at 3–4. But for efforts to tighten border enforcement, levels of illegal immigration may well be higher. Although the focus on perimeter policing appears to have limited efficacy at best, it continues to have political appeal. See, e.g., *Bush's Speech on Immigration*, N.Y. TIMES, May 15, 2006 (discussing

entrants would likely overwhelm the most well designed border strategy, let alone the more fallible American approach.²⁰⁷ In a world without fiscal or personnel constraints, the United States could saturate American borders and other ports of entry with personnel and ensure that few could escape an initial inspection.²⁰⁸ But this approach would be both unrealistic and extremely wasteful, and as importantly it would be incomplete because upwards of forty percent of illegal immigrants initially enter under a valid visa, and subsequently violate the visa terms or overstay.²⁰⁹

Interior enforcement strategies have proven far less effective in deterring illegal immigration and underscored the limits of a sole reliance on public enforcement tools. Recent enhancements in the automation and documentation of the entry and exit of foreign visitors have made it easier for authorities to document likely visa overstayers amongst the approximately 500

President Bush's plan to "train[] thousands of new Border Patrol agents and bring[] the most advanced technology to the border").

²⁰⁷ Because the costs of detention are prohibitive, Border Patrol agents face no choice but to fingerprint apprehended aliens and to deliver them to the Mexican border, only to see (or rather to miss seeing) the overwhelming majority of these individuals successfully run the gauntlet of the border region in future attempts. John L. Martin, Ctr. For Immigr. Stud., *Can We Control the Border? A Look at Recent Effects in San Diego, El Paso, and Nogales* (1995), <http://www.cig.org/articles/1995/border/border2.html> ("The Border Patrol has long known that many of the Mexicans whom it apprehends and requires to deport continue to repeat illegal entry attempts in the hope that they will succeed the next time.").

²⁰⁸ As immigration expert Wayne Cornelius has opined, "[s]hort of a full-scale militarization of the border, no policy will prevent a continued influx into this country of Mexican migrants." Wayne A. Cornelius, *Simpson-Mazzoli vs. The Realities of Mexican Immigration*, in *AMERICA'S NEW IMMIGRATION LAW: ORIGINS, RATIONALES, AND POTENTIAL CONSEQUENCES* 139, 141 (Wayne A. Cornelius & Ricardo Anzaldua Montoya, eds., 1983).

²⁰⁹ See PASSEL, *supra* note 177, at 9. One policy argument for a perimeter strategy is that individuals desperate enough to attempt illegal entry may be more likely to constitute a potential financial burden on the state or pose a greater threat to public order than those affluent enough to secure and violate a visa. However, the sophistication of human smuggling networks in securing visas may reduce the socio-economic gap between visa overstayers and illegal entrants (who trade higher risks for lower financial costs for illegal entry). Even if this point were true, the mandate of the Bureau of Immigration and Customs Enforcement is to enforce laws against illegal immigration, not merely to screen out those it deems "less socially desirable" aliens. See U.S. Immigration & Customs Enforcement, ICE Mission, <http://www.ice.gov/about/index.htm> (last visited Apr. 14, 2006).

million people who enter through U.S. borders each year.²¹⁰ However, overstayers can easily disappear into the American interior as, with the notable exception of employment verification, enforcers lack any means to track overstayers' whereabouts, unless they stumble into a background check by committing a crime.²¹¹ The federal government has required all aliens to register with immigration authorities in an effort to fill this gap, but those who register are presumably bona fide visa-holders or otherwise law-abiding aliens who would constitute the least appealing candidates for deportation.²¹²

The Bureau of Immigration and Customs Enforcement lacks the manpower, resources, and means to track down on its own the vast majority of undocumented aliens who do not register.²¹³ Although billions of dollars are allocated to policing the borders and other ports of entry, only a

²¹⁰ See Bryan Paul Christian, *Visa Policy, Inspection and Exit Controls: Transatlantic Perspectives on Migration Management*, 14 GEO. IMMIGR. L.J. 215, 232–33 (1999).

²¹¹ Heightened visa screening or the use of monetary conditions for applicants from high-risk countries may offer alternative ways to reduce risks of overstaying. Visa screening is by definition imprecise, but investing more State Department resources on visa screening is far less costly than tracking down overstayers. Compare Christian, *id.* at 217, 220 (discussing how low-level State Department officials base visa decisions largely on a few minute interview with applicants), with GOYLE & JAEGER, *supra* note 194, at 1 (estimating that it would take \$41 billion a year over five years just to apprehend, detain, and deport the illegal immigrants currently in the United States).

²¹² See Diane Cardwell, *Pakistani and Saudi Men Find Long Lines for Registration*, N.Y. TIMES, Mar. 22, 2003, at D2 (noting that about 100,000 noncitizen Arab adult men registered by the deadlines, which constitutes only a percentage of the estimated several hundred thousand Arab noncitizen men in the country); Corey Killgannon, *All-American? U.S. Says No; Teenager May Be Deported, but Pakistan Isn't Home*, N.Y. TIMES, Apr. 19, 2003, at D1 (describing the fear and outrage that this registration policy has created among Arab-Americans in New York City); Rachel L. Swarns, *Thousands of Arabs and Muslims Could Be Deported, Officials Say*, N.Y. TIMES, June 7, 2003, at A1 (detailing how about fifteen percent of the Middle Eastern men who registered with the immigration authorities now face deportation because of their illegal status, which led to a backlash to the registration policy).

²¹³ Even the registration of aliens is so time consuming that it has placed a significant strain on the manpower resources of the Bureau. See Eric Schmitt, *U.S. Will Seek to Fingerprint Visas' Holders*, N.Y. TIMES, June 5, 2002, at A2 (discussing how efforts to register Arab-American men overwhelmed the manpower resources of the INS). To have a realistic prospect of being effective, a registration plan must turn on the active support of local authorities in registering aliens. Although the federal government has sought to forge partnerships with state police forces in the wake of September 11th, McKenzie, *supra* note 180, at 1155–59, federalism continues to pose significant barriers to registration efforts and immigration enforcement more broadly. See Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promise of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 456–58 (1999).

token force of about 2000 Bureau of Immigration and Customs Enforcement officials enforce immigration laws in the American interior.²¹⁴ The understandable priority of these limited number of agents' efforts is identifying and removing criminal aliens upon their release from state and federal prisons.²¹⁵ Few would quarrel with making the deportation of criminal aliens a priority as they may pose the most direct threat to society.²¹⁶ However, the dearth of interior enforcement personnel means that the majority of interior enforcement resources are consumed by this task.²¹⁷ The remainder of scarce resources is scattered amongst efforts to target human smuggling and trafficking networks, noncriminal removals, benefit fraud, and enforcement of laws against employment of undocumented aliens.²¹⁸ Even to the limited extent that interior enforcement takes place outside of the criminal alien context, these efforts are largely related to

²¹⁴ As of 2002, only about 1,800 immigration enforcement officers are dedicated to enforcing immigration laws in the American interior outside of ports of entry. See Eric Schmitt, *Administration Split on Local Role in Terror Fight*, N.Y. TIMES, Apr. 29, 2002, at A1. This problem has only grown worse in recent years, as in 2004 the Bureau of Immigration and Customs Enforcement had a deficit of \$150 to \$200 million dollars, which has led to a hiring freeze and reduced enforcement efforts. See Clark Kent Ervin, *A To-Do List for Chertoff*, WASH. POST, Feb. 7, 2005, at A21.

²¹⁵ See IMMIGRATION AND NATURALIZATION SERV., BACKGROUNDER: INTERIOR ENFORCEMENT STRATEGY (1999), available at <http://uscis.gov/text/shared/lawenfor/interiorenf/strategy.htm>. While the Bureau of Immigration and Customs Enforcement does not have an official interior strategy, its resource allocation indicates that it continues to make screening for criminal aliens its overwhelming enforcement priority. See U.S. GEN. ACCOUNTING OFFICE, GAO-03-660T, HOMELAND SECURITY: CHALLENGES TO IMPLEMENTING THE IMMIGRATION INTERIOR STRATEGY 3-5 (2003) [hereinafter HOMELAND SECURITY], available at <http://www.gao.gov/new.items/d03660t.pdf> (statement of Richard M. Stana).

²¹⁶ For example, in 2000, attempts to determine the legal status of over 100,000 convicted criminals accounted for 91% of the cases taken up by enforcement officials. See 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, § VII, at 3-4 (2002) [hereinafter IMMIGRATION AND NATURALIZATION SERV.], available at <http://uscis.gov/graphics/shared/aboutus/statistics/yearbook2000.pdf>.

²¹⁷ See HOMELAND SECURITY, *supra* note 213, at 3-5.

²¹⁸ On average, each year the equivalent of four hundred officers' time is allocated to policing smuggling and trafficking networks, and the equivalent of two hundred officers' time or less is given to noncriminal removals, benefit fraud, and worksite enforcement, respectively. *Id.* at 5.

national security concerns,²¹⁹ and routine efforts at enforcing immigration laws have become the exception outside of the Mexican border region.²²⁰

Given the paltry number of interior enforcement officers, any increase in staffing would likely lead to marginally better results. Increased staffing alone, however, may do little more to solve internal enforcement problems than increases in staffing have addressed illegal border crossings. The primary barrier to interior enforcement is the ease with which undocumented aliens may virtually disappear within ethnic networks and communities. These networks often serve as an impetus for the decision to migrate and act as the primary mediating structures for immigrants to find housing, jobs, and other services.²²¹ Legal immigrants often serve as official covers to harbor and employ undocumented aliens, and extended families often include citizens, legal aliens, and undocumented aliens, a fact which further complicates oversight.²²² Employing officers with greater linguistic abilities and cultural understandings may modestly enhance the ability to oversee these networks, but acquiring the insider information needed to identify undocumented aliens on a large scale is likely well beyond the means of public enforcers to achieve on their own.²²³

²¹⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-06, IMMIGRATION ENFORCEMENT: DHS HAS INCORPORATED IMMIGRATION ENFORCEMENT OBJECTIVES AND IS ADDRESSING FUTURE PLANNING REQUIREMENTS 2–3 (2004).

²²⁰ *See id.*

²²¹ *See, e.g.,* ALBA & NEE, *supra* note 24, at 188.

²²² *See, e.g., id.* at 43.

²²³ Given fiscal constraints on personnel levels, one could imagine recourse to a selective enforcement strategy that concentrates efforts on policing ethnic networks and enclaves. However, this strategy could easily backfire. Racial profiling, whether actual or inferred, may fuel allegations of racism and discrimination against people of foreign origin. Crackdowns could poison relations between ethnic communities and federal and local officials and lead to the dispersal and greater decentralization of networks. In this atmosphere the understaffing of the Bureau of Immigration and Customs Enforcement could become an even more significant liability. The prohibitive social costs of such an approach would likely far outweigh any short-run enforcement benefits. *Compare* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000) (arguing that racial profiling against Latinos for illegal immigration enforcement perpetuates stereotypes of all Latinos as foreigners),

Even when the government is able to identify undocumented aliens, public enforcers lack effective sanctions to impose directly on undocumented aliens. Deportation may be the most plausible sanction,²²⁴ given that many undocumented aliens are judgment-proof and the sheer scale of illegal immigration would overwhelm detention centers and prisons.²²⁵ However, deportations are costly, especially outside of the border regions, and constitute an ineffective sanction because of the ease of illegal reentry.²²⁶ Additionally, both the economic and social costs entailed in the detention of undocumented aliens, deportation proceedings, and actual deportations are so prohibitive that this approach is not a viable option on a large-scale.²²⁷

Sanctions short of deportation, such as the denial of state services to undocumented aliens, have proven to be equally ineffective tools of deterrence.²²⁸ Economic opportunity, rather than

with Peter H. Schuck, *A Case for Profiling*, AM. LAW., Jan. 2002, at 59 (making the case for profiling in the context of counter-terrorism efforts).

²²⁴ See 8 U.S.C. § 1227 (2000) (specifying a number of conditions for which undocumented aliens may be deported, such as violating visa terms or entering without inspection). If deportees had been in the United States for more than 180 days or over one year before their apprehension, then they cannot legally reenter the United States for three years or ten years, respectively. See 8 U.S.C. § 1182(a)(9)(B)(i) (2000). The irony of this provision is that the sanction of a multi-year ban on legal reentry may all but force these individuals to resort to illegal immigration once again if they wish to reenter.

²²⁵ Imprisonment offers the illusory promise of making aliens “pay” for their illegal entry with their time. See 8 U.S.C. § 1325(a) (2000) (punishing undocumented aliens with up to a six-month prison sentence, a fine, or both for the first offense, and up to a two-year imprisonment, a fine, or both for a subsequent offense). These sanctions are rarely used for good reason, because systematic efforts to imprison undocumented aliens not only may arouse popular opposition, but also could pose immense social costs and overwhelm already overcrowded prisons. See PRELIMINARY OBSERVATIONS, *supra* note 176, at 17–18 (noting how the Homeland Security Department has decided that due to limited detention spaces, the detention of aliens subject to national security investigations were to be given priority, while employment-related aliens were to be given the lowest priority, which in practice meant they were to be routinely released).

²²⁶ Deportations may simply raise the financial cost for determined migrants, as repeat efforts to cross will almost inevitably result in success.

²²⁷ See GOYLE & JAESER, *supra* note 194, at 3; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1048–50 & nn.516–22 (1998) (discussing the legal costs associated with deportation proceedings).

²²⁸ For example, the federal government has denied undocumented aliens access to almost all public benefits except for emergency relief. See, e.g., IIRIRA 501, 8 U.S.C. §§ 1611, 1621 (2000) (denying access to all federal grants and licenses); Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (cutting off undocumented aliens’ access to most federal

social services, is the magnet for most illegal immigration, and denying services to aliens in their time of need may end up only magnifying the social burden in the long run.²²⁹ For example, cutting off access to services such as preventive medicine may ultimately force states to face higher burdens to provide constitutionally mandated emergency care.²³⁰ Additionally, the denial of basic services may make undocumented workers more vulnerable to involvement in organized crime.²³¹ This approach, like the other efforts at targeting undocumented aliens directly, failed because public enforcers lack the tools and the means to detect and deter undocumented aliens on their own.

C. The Limits of the Existing System for Enlisting Employers as Gatekeepers

The enlistment of employers as gatekeepers in 1986 constituted a recognition of the limits of public enforcement and the need to enlist private actors to fill the enforcement gaps in the American interior.²³² The theoretical appeal of requiring employers to verify the legal status of prospective employees is intuitive as this approach offers a way to target the economic roots of

public benefits); *see also* Proposition 187, 1994 Cal. Leg. Serv. Prop. 187 (West) (cutting off undocumented aliens' access to most public services in California).

²²⁹ *See* Wayne A. Cornelius et al., *Introduction: The Ambivalent Quest for Immigration Control, in* CONTROLLING IMMIGRATION, *supra* note 187, at 37 (arguing that “there is little empirical evidence for the proposition that availability of social services or entitlements is a powerful magnet for would-be illegal entrants”).

²³⁰ Prospective undocumented aliens may also face such poor conditions at home that these attempts at deterrence may have little or no effect. *See* Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 U.C.L.A. L. REV. 1475, 1478–80 (1995).

²³¹ Other sanctions may have illusory appeal, such as rescinding the automatic citizenship provision for children of undocumented aliens. Citizenship by birth may make the United States a more appealing destination than other developed countries. *See* Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 60 (1997). However, the merits of perpetuating illegal status from one generation to the next are dubious at best. As Peter Schuck has argued, even if citizenship by birth could be abrogated in the case of illegal immigrants, the notion of having a permanent noncitizen class of undocumented aliens being perpetuated from generation to generation appears repugnant to America's egalitarian ideals and broader policy objectives of immigrant assimilation. *See* SCHUCK, *supra* note 183, at 352.

²³² *See* Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (amending the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1524 (1952)); *see also* Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 203(b)(4), 110 Stat. 3009 (1996).

illegal immigration.²³³ Employers are uniquely positioned to function as gatekeepers because the vast majority of undocumented aliens come to the United States seeking economic opportunities from employers.²³⁴ An effective verification system with high levels of employer compliance could have high deterrent value in decreasing both the value and the availability of economic opportunities for undocumented aliens and thus making the United States a less attractive destination.²³⁵

The problem is that while employers are well positioned to serve as gatekeepers, their economic interests often clash significantly with good-faith compliance. Employers of low-wage workers and undocumented aliens share incentives to find ways around the substance of the verification requirement, which has led to large-scale subversion of the law.²³⁶ The same types

²³³ See Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

²³⁴ In theory, common carriers, landlords, banks, check-cashing stores, and retail stores could all be enlisted to screen for the legality of their customers, but this broader approach would impose much higher costs on society and pose greater challenges for monitoring. Each of these gatekeepers could be required to confirm the immigration status of individuals who are using their services or for whom they are providing services or face the prospect of liability. These gatekeepers already routinely check identification information for both legal reasons and their own self-interest and have developed swift, cost-effective ways to confirm identity and creditworthiness. If driver's licenses were made into a more secure, functional equivalent of a national I.D., see *infra* Part IV.B, these private actors could confirm immigration status at a low cost by swiping an identification card or typing in a social security number. If the error rate of federal databases were low and the expected value of sanctions outweighed compliance costs, this broad gatekeeper approach could create significant deterrence for undocumented aliens by making it quite difficult for them to participate in any facet of the U.S. economy. The downside of this approach is that the broad enlistment of gatekeepers could pose high social costs on all Americans and place unconscionable burdens on undocumented aliens. It would also suffer from a lack of effective monitoring of compliance as both the nature of transactions and their scale would make it difficult for the government to monitor more than a token amount of transactions. In contrast, an employer gatekeeper approach would impose a minimal burden on the American public by limiting identification confirmation to a single context and not bar undocumented aliens from access to essential goods and housing.

²³⁵ This point would be especially true for the eighty percent of undocumented aliens who are from Mexico and other parts of Central America, and therefore have more economically viable options of returning to their home countries. See B. LINDSEY LOWELL & ROBERTO SURO, PEW HISPANIC CTR., HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.-MEXICO MIGRATION TALKS 7 (Mar. 21, 2002), available at <http://www.pewhispanic.org/reports.jsp?s=allreports>.

²³⁶ See Andrew Parker, *Collecting What America Owes*, FINANCIAL TIMES, Feb. 28, 2005, at A9 (quoting Mark Everson, head of the Internal Revenue Service, as saying "What we cannot afford is to let

of shortcomings that have compromised direct enforcement efforts against undocumented aliens have led to chronic failures to monitor employer compliance. The Bureau of Immigration and Customs Enforcement lacks both the manpower and the means to acquire insider information on noncompliance on its own, and this fact coupled with flaws in the design of the verification system has led to the virtual abandonment of large-scale efforts at monitoring employers.²³⁷

The verification regime requires employers to confirm the identity and employment eligibility of all workers and to terminate their employment if they lack the proper identification materials or if their illegal status later comes to light.²³⁸ Employers face a sliding scale of sanctions for the knowing employment of undocumented aliens, ranging from a warning and a \$275 fine for initial violations to a \$11,000 fine for repeat offenders.²³⁹ Both employers and prospective employees must certify the receipt and submission of legal work authorization materials.²⁴⁰

our tax laws be viewed in the same way as our immigration or drug laws are, where too large a segment of the population says: ‘Those laws are not what we respect.’”).

²³⁷ As former INS Commissioner Doris M. Meissner conceded: “This whole area of employer enforcement has been moribund. There has been a steady decline in effort and resources directed at the workplace.” See Robert Pear, *Clinton to Ban Contracts To Companies That Hire Undocumented Aliens*, N.Y. TIMES, Jan. 23, 1996, at A12.

²³⁸ Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (amending the Immigration and Nationality Act of 1986, 8 U.S.C. §§ 1101-1524 (1952)); see also Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 203(b)(4), 110 Stat. 3009 (1996).

²³⁹ See 8 U.S.C. § 1324a(e)(4) (2000); 8 C.F.R. § 274(a)(10)(b)(i)(ii) (2000). These figures greatly overstate the value of fines as employers routinely negotiate down the level of sanctions in plea bargaining with the Bureau of Immigration and Customs Enforcement. See PRELIMINARY OBSERVATIONS, *supra* note 176, at 17. Employers also face possible criminal penalties for a pattern or practice of violations, although this provision has rarely, if ever, been used. See, e.g., Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 203(b)(4), 110 Stat. 3009 (amending 8 U.S.C. § 1324(a) (1996)) (imposing a penalty of up to five years imprisonment for the hiring of ten known undocumented aliens within twelve-month period).

²⁴⁰ Employees’ violation of this certification may lead to perjury and additional civil fines, although employees have rarely been directly targeted. See 8 U.S.C. § 1324a(a)–(h) (2000).

The range of materials that prospective employees may furnish to prove work authorization makes the rules easy to satisfy or sidestep.²⁴¹ Broad access to counterfeit identification materials,²⁴² and the absence of a requirement to check the identification against a national database, makes it easy to satisfy the verification requirements.²⁴³ Prospective workers can present illegal documentation and employers need only show that they did not know that the documentation was false.²⁴⁴ The knowledge standard makes it difficult to prove employer violations except in the blatant cases of failures to request or submit identification materials or other clear evidence of fraud or collusion.²⁴⁵

Low fines and low levels of enforcement have combined to produce little deterrent effect for employers to engage in more than formalistic compliance.²⁴⁶ Worksite enforcement has

²⁴¹ See 8 U.S.C. §§ 1324a(b)(1)(B)–(C) (2000).

²⁴² See DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., I-96-08, IMMIGRATION AND NATURALIZATION SERVICE EFFORTS TO COMBAT HARBORING AND EMPLOYING ILLEGAL ALIENS IN SWEATSHOPS 2–7 (1996); *see also* U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD-99-105, ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST 2–3 (1999). The federal government has required all visitors to have machine-readable passports by October, 2004 and bio-metric passports by October, 2005. See Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (2002). But the problem is that the horse is already out of the barn as starter identification documents such as birth certificates and social security cards are already readily available on black markets. See U.S. SENTENCING COMM'N, ECONOMIC CRIMES POLICY TEAM, IDENTITY THEFT FINAL REPORT 10–13 (1999) (discussing how social security numbers and driver's licenses are widely exploited as “breeder” documents to secure other legal forms of identification).

²⁴³ H.R. 4437 and S. 2611 seek to close this particular loophole by requiring employers to confirm the social security numbers of job applicants against an electronic database, a significant reform discussed in part IV. See H.R. 4437, 109th Cong. §§ 701, 702 (2005); S. 2611, 109th Cong. §§ 274A(d), 274A(e) (2006). While the abundance of counterfeit starter documents such as birth certificates will allow undocumented aliens to acquire social security numbers, at minimum this approach will raise the costs for undocumented aliens to enter into labor markets and pressure employers to engage in more explicit legal violations by not checking social security numbers against this database in order to hire undocumented aliens. For a more complete discussion on this point, see Part IV.B.

²⁴⁴ See 8 U.S.C. § 1324a(b)(c)(ii) (2000).

²⁴⁵ Employers must retain copies of documentation for three years after hiring and one year after dismissal. 8 U.S.C. § 1324b(3)(B). However, so long as a formal verification process has taken place, it is unlikely that the knowing hiring of an illegal alien can be uncovered or proven.

²⁴⁶ Sanctions range from \$275 for first time offenders who knowingly employ undocumented aliens up to \$11,000 for repeat offenders. See 8 U.S.C. § 1324a(e)(4) (2000); 8 C.F.R. § 274a(b)(1)(ii) (2000).

consumed no more than two percent of the former Immigration and Naturalization Service (INS) and its successor agency's enforcement resources over the past decade.²⁴⁷ In 1999 the INS dedicated only the equivalent of 240 agents' time (or 9% of its investigative force) to the oversight of employers, and this number dropped to a paltry 90 agents (or 4% of its investigative force) in 2003.²⁴⁸ The Bureau of Immigration and Customs Enforcement has almost exclusively focused its enforcement resources on national security concerns, such as airports and power plants, and on the detection of criminal aliens in the wake of September 11, 2001.²⁴⁹ Even in the rare instances when employers are caught red-handed, they are at best given a slap on the wrists with miniscule fines.²⁵⁰

Firms have a myriad of strategies to minimize the possibility of effective oversight and sanctions, such as engaging in formalistic compliance, subcontracting functions to third parties who function on the edges of the underground economy, and failing to keep any record of undocumented alien employees.²⁵¹ Firms are immune from sanctions if they satisfy the formal

Additional penalties of \$110 to \$1100 apply for failure to complete and retain Form I-9 records verifying compliance. *See* 8 U.S.C § 1324a(e)(4)(A) (2000); 8 U.S.C § 1324a(e)(5) (2000).

²⁴⁷ *See* U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD-99-105, *supra* note 240, at 4; *see also* PRELIMINARY OBSERVATIONS, *supra* note 176, at 18 (noting that the number of worksite arrests decreased from 2849 in 1999 to 445 in 2003). The number of employer investigations ranged only from 5149 to 7788 per year between 1992 and 2000. These investigations resulted in a height of 773 warnings in 1997, a figure that declined to only 282 warnings in 2000. Notices of intent to fine employers peaked at just over 1000 in 1994 and declined to only 178 in 2000. *See* IMMIGRATION AND NATURALIZATION SERV., *supra* note 214, at 4 & table 60.

²⁴⁸ *See* PRELIMINARY OBSERVATIONS, *supra* note 176, at 3.

²⁴⁹ *See id.* at 12; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: DHS HAS INCORPORATED IMMIGRATION ENFORCEMENT OBJECTIVES AND IS ADDRESSING FUTURE PLANNING REQUIREMENTS 6–7 (2004), <http://www.gov/new.items/d0566.pdf>.

²⁵⁰ For example, Wal-Mart was caught employing at least 250 undocumented aliens and suspected of employing many times more. The punishment of an eleven million dollar fine appears so miniscule to a \$220 billion corporation that it will have little-to-no deterrent effect. *See* Steven Greenhouse, *Wal-Mart to Pay U.S. \$11 Million in Lawsuit on Immigrant Workers*, N.Y. TIMES, Mar. 19, 2005, at A1.

²⁵¹ *See, e.g.*, Harry Austin, *When Employers Lure Illegals*, CHATTANOOGA TIMES FREE PRESS, Nov. 16, 2003, at F4 (discussing Wal-Mart's claim of no knowledge due to the practice of using contractors to recruit employees).

requirements of the verification system and did not know of their employees' illegal status.²⁵² Even if firms knowingly employed undocumented aliens and knew that there was a high probability of being caught, the marginal advantages in terms of wages and productivity from employing undocumented aliens may exceed potential fines under the current system.²⁵³ The shortcomings of the verification regime appear to have emboldened both employers and undocumented aliens to violate the provisions at ever-increasing levels.²⁵⁴ Although flaws in the design of the verification requirements and a lack of monitoring of employer compliance have doomed the current system to failure, the following part will show how the use of private monitors can breathe new life into the gatekeeping duties of employers by providing them with credible threats that their compliance measures will be subject to ongoing oversight.

IV. REDESIGNING THE EMPLOYMENT VERIFICATION REGIME

The existing employment verification system has flaws in its design and implementation, but this part will suggest how enlisting private monitors may provide employer gatekeepers with heightened incentives to comply with their verification duties. It will show how policymakers may enlist undocumented aliens as part of a de facto sting operation that would paradoxically use the incentive of legalization to encourage undocumented aliens to report employer violations. Alternatively, it will suggest how other private actors, such as competitors, employees, and other

²⁵² The nominal enforcement of this law is likely worse than having no law at all, as it has fostered norms of formalistic compliance with the law, but subversion of the law's substance.

²⁵³ Undocumented aliens bring skills with a willingness to work at lower wages, for longer hours, and in poor working conditions. Companies may feel they have to risk sanctions, because competition necessitates reliance on the most cost-effective labor available. See Celia W. Dugger, *A Tattered Crackdown on Illegal Workers*, N.Y. TIMES, June 3, 1996, at A1 (quoting a N.Y. City textile factory owner saying, "I have to make a profit. . . . I think I have to hire illegal people because I don't want to pay \$7, \$8 for work that illegal people can do for \$4.25.").

²⁵⁴ Other variables obviously have shaped the upsurge in illegal immigration, such as economic dislocations caused by the implementation of NAFTA. However, the failure of employer sanctions may have demonstrated the lack of will to enforce immigration laws and tacitly encouraged further immigration.

members of the community, may be well placed to serve as informants or qui tam litigants to enhance gatekeeper oversight. This part will underscore the viability of this proposal by highlighting how the federal government may make available the document and database tools for employers to comply with their immigration duties in a swift, cost-effective way. Lastly, it will suggest how reforming the duty standard for employment verification and enhancing antidiscrimination protections for legal aliens and citizens of foreign origin may mitigate risks of overdeterrence.

A. The Merits of Private Monitoring of Employer Compliance

1. The Perpetual Sting Operation of Enlisting Undocumented Aliens as Informants

One of the fundamental challenges facing immigration enforcement is the fact that employers and undocumented aliens share an interest in subverting immigration laws. The vast wage gap between the United States and undocumented aliens' countries of origin makes undocumented aliens often willing to provide services at or below minimum market rates and to acquiesce to labor law violations.²⁵⁵ Employers are more than willing to turn a blind eye to immigration violations and identify fraud to secure a cheap, exploitable labor source and to bolster their profits.²⁵⁶ So long as the interests of both undocumented aliens and employers remain aligned, both parties may continue to seek innovative ways around any stumbling blocks that public enforcers may throw in their way.

For this reason public enforcers need to consider unconventional tactics to divide the interest of undocumented aliens from their employers. On a very limited scale, the Bureau of

²⁵⁵ See *supra* Part III.C. The significance of this issue is underscored by the fact that the Supreme Court is hearing oral arguments in April, 2006 concerning the ability of workers to bring a RICO claim against their employer for depressing their wages by systematically hiring undocumented aliens. See *Mohawk Industries, Inc. v. Williams*, 411 F.3d 1252, 1258 (11th Cir. 2005), *cert. granted*, 126 S. Ct. 830 (2006).

²⁵⁶ See *HOMELAND SECURITY*, *supra* note 213, at 3–6; Dugger, *supra* note 251.

Immigration and Customs Enforcement and the former INS have targeted undocumented aliens directly through sting operations by creating sham companies or job opportunities to trap undocumented aliens who are seeking employment.²⁵⁷ These tactics may have modest deterrence value in capturing headlines and leading to the detention and deportation of small numbers of immigrants.²⁵⁸ But enforcement agents lack the resources to carry out these types of sting operations on a large scale, as the costs of detentions, legal proceedings, and deportations would be financially ruinous and potentially impose an unconscionable human cost on illegal immigrants and their families.²⁵⁹

Instead of wasting scarce resources in attempting to target undocumented aliens directly, enforcement energies should be directed solely against employers to dampen the demand for undocumented alien labor. Public enforcers should implement a more counterintuitive strategy of enlisting undocumented aliens as monitors of employer compliance. Enforcers could embrace a piecemeal approach of setting up individual sting operations against employers using undocumented aliens, but this strategy would be hamstrung by the costs and energies that agency-led sting operations would absorb. Instead, public enforcers should decentralize enforcement efforts by offering incentives of temporary or permanent legalization to any undocumented aliens who are willing and able to report and substantiate employer violations. By seeking to enlist any undocumented aliens as potential informers against their employers, enforcers may be able to drive a wedge between the interests of undocumented aliens and

²⁵⁷ See, e.g., Steven Greenhouse, *U.S. Officials Defraud Ploy to Catch Immigrants*, N.Y. TIMES, Feb. 11, 2006, at A8.

²⁵⁸ See Steven Greenhouse, *An Immigration Sting Puts Two Federal Agencies at Odds*, N.Y. TIMES, July 16, 2005 (discussing a controversial sting operation in which immigration agents posed as organizers of an Occupational Safety and Health Administration meeting in order to detain forty-eight undocumented aliens).

²⁵⁹ See GOYLE & JAEGER, *supra* note 194, at 1 (estimating that it would take \$41 billion a year over five years just to apprehend, detain, and deport the undocumented aliens currently in the United States).

employers. If all undocumented alien applicants had the incentive to inform on their employers for their own hire, employers may become far more wary of subverting the verification process by casting a blind eye to illegal status.²⁶⁰ This attempt to disrupt symbiotic employer-employee relationships would constitute a perpetual sting operation, which, if coupled with strong sanctions, could produce lasting incentives for employer compliance with their gatekeeper duties.²⁶¹

The logic of using incentives for undocumented aliens to report on gatekeeper violations turns on the fact that undocumented aliens are in the best position to prove their own illegal status and would often be able to confirm firsthand what compliance measures employers did or did not perform in their particular case. The nature of ethnic networks and workplace interaction would also place undocumented aliens in a good position to know whether their employers were engaging in a pattern of employing undocumented aliens. It may be troubling to some to reward culpable parties for disclosing illicit acts that they instigated, and this approach would admittedly pose moral hazards. However, the enforcement benefits from this decentralization of employer monitoring could dramatically magnify the deterrent effect for employers.

One important question is what level of incentives would be sufficient to get undocumented aliens to come forward on a large scale to report on employer violations. Undocumented aliens

²⁶⁰ The possibility that undocumented aliens may report employer violations may at minimum give employers incentives to compensate and treat undocumented aliens better, which may be good in itself and accord with the objectives of those who seek greater protections for undocumented alien workers. See, e.g., Elizabeth M. Dunne, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 624–26 (2000); Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2179–84 (1994). As importantly, this response by employers would have the valuable collateral effect of making the economics of employing undocumented aliens less favorable for employers and help to dampen demand for undocumented alien labor.

²⁶¹ This approach would also create incentives for employers to discriminate against all individuals of apparent foreign background, an issue which part IV.D will address.

may feel they have much to lose from going to the authorities and risking changes in the status quo of their employment. As discussed earlier, the federal government has few tools to prosecute undocumented aliens in the American interior because of the prohibitive costs of detentions, hearings, and deportations.²⁶² Undocumented aliens, however, may hold fears of deportation that vastly outweigh the probability of this sanction and make them leery of any contact with authorities.²⁶³ They may not want to take any risks that could imperil their current economic position as their extended families often may rely on them to send remittances home.²⁶⁴ And undocumented aliens may have legitimate fears of retaliation from their fellow workers or other members of their community for cooperating with the authorities. Therefore, the incentives for cooperation must be significant enough to overcome these concerns.

The most effective incentive that the federal government has to offer is the temporary or permanent legalization of the undocumented aliens. Currently, undocumented aliens may be able to secure counterfeit documents and engage in identity fraud at low cost to sidestep employment restrictions,²⁶⁵ but undocumented aliens are likely to place a high value on legalization. A temporary work visa or permanent residency would allow undocumented aliens to return home for periods of time without risking deportation on their return, provide access to

²⁶² See *infra* Part III.B.

²⁶³ See Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 62–63 (2002) (arguing that “when intense emotions are engaged, people tend to focus on the adverse outcome, not on its likelihood,” which may significantly distort private and public decisions).

²⁶⁴ The remittances that undocumented aliens send home to our regional neighbors form America’s de facto foreign aid program. In 2004 undocumented workers sent \$45.8 billion dollars of remittances to their families in Latin America and the Caribbean. See Richard Lapper, *Remittances to Latin America and Caribbean*, FIN. TIMES, Mar. 21, 2005, at 8; see also Stephen Fidler, *New Migrants Spur Growth in Remittances*, FIN. TIMES, May 17, 2001, at 7 (highlighting the fact that remittances from the United States dramatically exceed development aid to Latin America and equal about one-third of foreign direct investment to the region).

²⁶⁵ See Press Release, INS, INS Cracks National Counterfeit Document Operation (Nov. 13, 1998), available at <http://uscis.gov/text/publicaffairs/newsreels/fineprint.htm>.

social services, tax refunds, and Social Security contributions, create eligibility for permanent residency, and make their day-to-day lives much more secure by removing fears of detection.²⁶⁶

The question remains of how public enforcers could make the reward proportional to the scale of wrongdoing that an undocumented aliens exposes. The federal government could offer undocumented aliens a sliding scale of rewards ranging from a one-year temporary workers' permit to permanent residency based on the scale of gatekeeper wrongdoing that their information helps to uncover. Making the minimum reward of a one-year or two-year temporary workers' permit renewable, at least for a set period of years, could place undocumented aliens in a position far better than living on the edges of legality.²⁶⁷ Even the minimum reward may produce a significant incentive for undocumented aliens to assume the risks of reporting their employer, and offering work permits for longer periods up to permanent residency status would produce incentives for disclosing multiple instances of employer noncompliance.

Although legalization may be valuable to undocumented aliens, this reward alone may not provide sufficient incentives for undocumented aliens to cooperate with authorities. Undocumented aliens may face a stiff price for reporting on their employers, such as disruption of their current employment and exposure to threats, retaliation, or alienation from their communities. Thus, two other forms of compensation may be appropriate. First, they should be eligible for monetary rewards of a percentage of the sanction that employers face as a result of

²⁶⁶ See, e.g., George W. Bush, President of the U.S., President Bush Proposes New Temporary Worker Program, Remarks by the President on Immigration Policy (Jan. 7, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/01/20040107-3>.

²⁶⁷ To assuage the concerns of those who believe this approach may take away the ability of enforcers to address legitimate threats that undocumented aliens may pose, it is important to underscore the fact that temporary or permanent residency would be subject to the same conditions that temporary and permanent residents of the United States already face. In particular, just as under current law, the commission of crimes of moral turpitude would form a basis for revoking temporary or permanent residency. See, e.g., 8 U.S.C. § 1182(a)(2) (2000).

their tip.²⁶⁸ Because of the value of legalization, this incentive may not need to be as high as to attract other informants or qui tam litigants for whom money would be the sole reward. But allowing financial compensation may still offer a way to create proportional incentives to the value of the information uncovered.

A second and far more costly form of compensation would be offering cooperating undocumented aliens new identities and the chance for them and their families to be relocated. A witness relocation program may be key for overcoming the significant deterrent to cooperation with authorities that ruthless human trafficking and smuggling networks may pose.²⁶⁹ These groups would not be pleased with activities that threatened to disrupt their “business model” of transporting and connecting undocumented aliens with employers. Therefore, the combination of additional monetary rewards and witness relocation may be necessary to overcome these disincentives.²⁷⁰

Another question is what reward to give undocumented aliens who produce evidence of a given gatekeeper’s violations, but who are not the first to do so. The value of their contribution may be significantly less, if only because the first tips may alert enforcers to investigate a gatekeeper further and prompt piggyback claims from other undocumented aliens who may be

²⁶⁸ See Cohen & Rubin, *supra* note 99, at 174–76 (discussing the benefits of enforcement by private agents who have a direct interest).

²⁶⁹ The risk of retaliation may be especially high in contexts where illegal employment networks are interconnected with human trafficking or smuggling syndicates. See Sadruddin et al., *supra* note 26, 382–84 (discussing how human trafficking and smuggling syndicates may easily threaten violence against members of their ethnic communities or their relatives in their home countries to deter any cooperation with authorities).

²⁷⁰ One irony of a witness relocation program for cooperating aliens is that many, if not most, have assumed false identities to enter and work in the United States, and therefore their professional and educational reputation may often not be closely tied to their employment prospects. They may nonetheless have significant community ties that may form a deterrent to cooperation for both positive and negative reasons. In spite of this fact, the impact of receiving a new identity and a fresh start may be less than for many other prospective types of informants and may often be consistent with their economic motives for entering the United States.

affected. But the quandary is that policymakers would need to ensure that undocumented aliens would not be deterred from reporting violations because of fears that being the second or third to report could expose them to the risk of deportation.

If every person who reported gatekeeper violations received a one-year or two-year, potentially renewable temporary worker status, then one can easily imagine that undocumented workers would likely agree amongst themselves to go en masse to enforcers to report violations so that they all could benefit. This approach would not necessarily be bad as social and ethnic bonds amongst undocumented aliens may be so tight that they will only go to report violations if it does not hurt their friends and neighbors. However, this approach could also become a gaping backdoor for subverting the system and overwhelm enforcers with the sheer number of tips from aliens seeking temporary worker status. For this reason, it may be more appropriate to offer immunity for those who are second or third in offering good-faith tips on the same set of gatekeeper violations and to vest discretion in enforcement officials to determine whether to grant temporary worker status in these contexts. The underlying goal of this enforcement proposal is to target employers and only indirectly to shape incentives for undocumented aliens not to enter the U.S. or to return home by diminishing opportunities for illegal employment. For this reason granting immunity to undocumented aliens who come forward to the authorities is consistent with the policy objectives. This approach may still pose risks, but it may offer the best balance between encouraging tips from undocumented aliens, while not making it such a broad loophole for legalization that it undercuts the enforcement objectives.

Another concern would be that legalization and monetary rewards may pose too great an incentive for undocumented aliens to inform on employers and almost beckon fraud. Explicit fraud could undermine the approach and the danger of nuisance accusations and lawsuits could

impose high costs on employers. If the sanctions for employers are low, then one can imagine employers willingly being caught employing undocumented aliens for under-the-counter payments from the undocumented aliens. This fraud could become the de facto outlet for legalization of undocumented workers with the government receiving “legalization payments” vis-à-vis the sanction paid to employers. It is hard to place a price on what legalization would be worth to undocumented aliens or prospective immigrants, but depending on the availability of outlets for legal temporary employment or permanent immigration it may well be worth many times more to the undocumented alien than the fine costs the employer. This temptation would be especially strong for small-scale employers who would have the least reputational costs at stake. One factor that may mitigate this risk is the fact that being caught for immigration offenses may lead to higher penalties for subsequent offenses and a heightened probability of monitoring and enforcement for other crimes. These collateral effects may make this type of collusion uneconomical for gatekeepers.

A related concern is the burden frivolous suits may impose on gatekeepers. The danger of fraud and deception is quite substantial because of the strong incentives undocumented aliens may have to trap employers in a self-serving sting operation. The incentives for deception may also cast doubt on the testimony of undocumented aliens whose veracity may be challenged because their self-interest would be closely intertwined with the conviction of gatekeepers. One consideration that may temper this danger is the fact that undocumented aliens are by definition also in a vulnerable position and would have understandable fears about disclosing their illegal status to authorities unless they had credible claims, as they would fear losing their jobs or being

exposed to deportation.²⁷¹ In contrast, informants or qui tam litigants may have greater incentives to offer more speculative claims or frivolous tips because of the lack of repercussions (except in harming their credibility to public enforcers), and qui tam litigants may merely pursue cases for their potential settlement value or to see if they can uncover evidence of actual violations through discovery.

This approach may ironically arouse the ire of opponents of illegal immigration because it legitimates the status of undocumented aliens. They might argue that offering the reward of legalization is hypocritical as it may undercut other enforcement efforts and may enhance the appeal of the United States as a destination for undocumented aliens. But it is important to stress that this approach is distinguishable from general amnesty programs, which paper over the problem in the short run but create expectations for future undocumented aliens that they too will be legalized if they dwell long enough in the United States.²⁷² Instead, the virtue of this approach is that it rewards undocumented aliens for their contribution to heightening overall enforcement against employers. It consciously trades off present enforcement against cooperating undocumented aliens in exchange for greater incentives for employers to comply with their verification duties in the long run.²⁷³

²⁷¹ See Sunstein, *supra* note 263, at 62–63 (arguing that when strong emotion is involved, people tend to focus on the negative outcome and not on the likelihood of occurrence).

²⁷² See JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan through Clinton, 1981–2001*, 16 GEO. IMMIGR. L.J. 601, 610 (2002) (discussing the amnesty policy implemented by the Immigration Reform and Control Act of 1986).

²⁷³ Another virtue is that it would be quite low in expenditure terms (which is a significant criteria for securing congressional support). See Cohen & Rubin, *supra* note 99, at 176 (arguing that when an enforcement agent has an incentive to maximize his self-interest, the policymaker's interest is also maximized, resulting in a more efficient system). In fact, this approach may even “pay” for itself as the revenues from employer fines could offset many of the costs from legalizing the cooperating undocumented aliens.

Use of the incentive of legalization could also complement the creation of a large-scale temporary workers' program for low-skilled workers.²⁷⁴ Heightened immigration enforcement would produce pressures from sectors of the economy that have depended on undocumented alien labor for access to low-skilled workers and the creation of a temporary workers' program.²⁷⁵ The enactment of meaningful immigration enforcement measures could be combined with the creation of a temporary workers' program as a quid pro quo to overcome the significant political stumbling blocks to reform.²⁷⁶ If a temporary worker program were on a large enough scale, it would have the added benefit of providing greater incentives for prospective undocumented aliens to work through legal channels to enter the United States by providing a credible alternative to illegal immigration. The government could attempt to manage flows of migrant workers by offsetting grants of temporary worker status to cooperating wrongdoers by reducing the number of available temporary worker slots in any given year.

The social costs and risks from enlisting undocumented aliens as part of an ongoing sting operation are significant and must be weighed against the benefits of heightened monitoring and access to insider information. However, the moral hazards posed by offering a reward of legalization to undocumented aliens may be a small price to pay for an approach that may split

²⁷⁴ The creation of a temporary workers' program would serve both as a logical complement to greater enforcement against illegal immigration and as a valuable political compromise. Current Senate legislation recognizes the value of integrating these two facets of immigration reform. *See* S. 2611, 109th Cong. (2006) (proposing the coupling of the introduction of a temporary worker program and procedures for the legalization of undocumented aliens who have long resided in the United States with heightened enforcement measures).

²⁷⁵ While the Bush administration's proposal for a temporary workers' program has languished on the legislative back burner since the attacks of September 11, 2001, creating temporary employment opportunities may address the labor needs in low-wage industries that undocumented aliens currently fill and provide incentives for prospective immigrants to work through legal channels. *See* President George Bush, *supra* note 264 (laying out a proposal for a temporary workers' program).

²⁷⁶ The Immigration Reform and Control Act of 1986 followed a modified version of this approach in integrating the creation of an employer verification system with an amnesty for a large percentage of existing undocumented aliens. *See* Pub. L. No. 99-603, 100 Stat. 3359 (1986) (amending the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1524 (1952)).

the interests of employers and undocumented aliens. Though this approach may be controversial, it may create lasting incentives for employers to comply with their verification duties.

2. *Enlisting Private Informants and Qui Tam Litigants as Monitors of Employers*

Although undocumented aliens may be in the best position to report on employer compliance and offer conclusive evidence of gatekeeper violations, cooperation by undocumented aliens with the authorities may be limited by concerns about potential economic dislocation or threats of violence or other forms of retaliation. This fact raises the need to explore how other private monitors could help fill enforcement gaps.

In many other contexts we would examine the potential for victim suits to serve as a means to hold gatekeepers accountable for failures to fulfill their duties. But one of the many challenges of immigration enforcement is that there is no identifiable class of victims, as illegal immigration imposes widely dispersed costs on society.²⁷⁷ Both the scale of these costs and even the existence of “victims” from illegal immigration are contentious political questions.²⁷⁸ Even to the extent policymakers could identify or specify particular classes of individuals adversely impacted by illegal immigration, such as low-wage workers who directly compete with

²⁷⁷ See Sen. Alan K. Simpson, *The Immigration Reform and Control Act: Immigration Policy and the National Interest*, 17 U. MICH. J.L. REFORM 147, 152 (1984) (noting that the exact impact of illegal immigration is difficult to gauge).

²⁷⁸ The uneven distribution of the social benefits and social costs of illegal immigration makes the net costs more difficult to document and imposes disproportionate burdens on those with the least political clout. See BORJAS, *supra* note 195, at 105–08. For example, low-income localities bear the burden of paying for the public education of children of illegal immigrants out of local property taxes, while farmers or other corporate beneficiaries of low-wage workers shoulder few of the costs. As Robert Borjas has highlighted, other costs are harder to document, such as downward pressure on low-income wages in illegal immigrant destinations, because migration from these areas to other parts of the country partly offsets these effects. See George J. Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market* (Nat’l Bureau of Econ. Research, Working Paper No. 9755, 2003) [hereinafter *Labor Demand*].

undocumented aliens,²⁷⁹ it is far from clear how to define the harm from gatekeeper violations in any given case, let alone to imagine what damages would be appropriate to redress the harm.

In contrast, the enlistment of qui tam litigants and private informants sidesteps the thorny issue of victim status and offers public enforcers practical ways to enhance access to insider information and to heighten levels of enforcement. If these private actors received a percentage of the sanction and the likelihood of receiving this reward were sufficiently high, private actors could be expected to provide tips to enforcers or to investigate or prosecute employers for violations.²⁸⁰ This approach would envision four types of prospective informants or qui tam litigants: competitors, employees, job seekers, and other members of the community at large.²⁸¹

An employer verification regime arguably serves as an unfair competition law. Firms that exploit undocumented alien labor may enjoy a significant cost advantage over their law-abiding counterparts, who pay legal minimum wages, overtime, and social security and wage taxes. Even if firms do pay taxes for undocumented alien employees, they may also exercise their leverage over undocumented aliens to violate other laws in pushing undocumented aliens to work longer and harder under illegal working conditions.²⁸² In a competitive market situation,

²⁷⁹ See Borjas, *Labor Demand*, *supra* note 276, at 1335 (concluding that immigration lowers the wages of competing workers with similar skills and education).

²⁸⁰ See Cohen & Rubin, *supra* note 99, at 175–76.

²⁸¹ A fifth type of prospective informant would be bounty hunters with no ties to the community whose mercenary motives could provide sufficient incentives for them to invest in monitoring employer compliance. See Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 80–81 & n.31 (discussing the historical role of bounty hunters and their contemporary role as bonds bailsmen). The list of potential private monitors is not comprehensive, but suggests the types of individuals who would have the interest and opportunity to monitor and report on violations by employers.

²⁸² See Foo, *supra* note 260, at 2181 (discussing the harsh and illegal working conditions that undocumented aliens often face); Abel Valenzuela, Jr. et al., *On the Corner: Day Labor in the United States*, January, 2006, at 12-16, available at http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf (discussing employer workplace violations and abuses of day laborers).

nonenforcement of employer sanctions against a significant number of firms may necessitate that other firms subvert the law and hire undocumented aliens simply to remain competitive.²⁸³

Under the current system, virtue is its own (and sole) reward for law-abiding firms as they may face competitive disadvantages if they comply with their duties by actively screening for undocumented aliens, and they have little to gain from monitoring their competitors' compliance. Empowering companies to serve as private informants and qui tam litigants would provide firms with a significant financial incentive to police one another.²⁸⁴ An informant system would give firms incentives to monitor competitor compliance and provide them with greater reason to pressure public enforcers to act on their tips.²⁸⁵ A qui tam approach would provide firms with a weapon directly to enjoin the illegal and unfair business practice of employing undocumented aliens. The threat of financial sanctions, coupled with the fact that a percentage of the proceeds would go to the competitor litigant, may provide greater deterrence for firms. This approach could level the playing field in a way similar to private causes of action for enforcing antitrust laws.²⁸⁶ One significant difference is that because the impact of employment violations is far more diffuse than antitrust violations, competitors would simply receive a percentage of the

²⁸³ For example, textile firms in the United States have frequently claimed that they have no choice but to employ undocumented aliens because of intense wage pressures. *See* Dugger, *supra* note 251, at A1.

²⁸⁴ The danger of collusion on the employment of undocumented aliens exists, but the economic incentives for reporting or prosecuting may make collusion difficult to sustain in the long run. *See* Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9, 18–21 (2004) (discussing in the antitrust context how oligopolists may be able to sustain tacit collusion in the long run, but noting how the difficulty of sustaining collusion increases sharply when the number of participants increases).

²⁸⁵ This approach poses an obvious danger of tips that are designed to harass competitors, but having public enforcers screen tips should mitigate this risk, as competitors who cry wolf would lose their credibility over time. In the case of qui tam suits, incorporation of a “loser pays” provision covering legal fees and other expenses should also reduce the risk of harassment suits.

²⁸⁶ *See, e.g.*, Clayton Act of 1914, 15 U.S.C. §§ 1–27, 29 U.S.C. §§ 52–53 (2005) (creating a private cause of action for antitrust violations with treble damages).

sanctions and would not need to establish the level of damages or lost profits caused by unfair competition.

Other types of prospective informants or litigants would include workers within the gatekeeper firm, job seekers, and other members of the community who may all have both the incentives and access to uncover employer wrongdoing in exchange for rewards. Employees may be well situated to know of the legal status of other employees just by engaging in conversations with their coworkers. They may also enjoy the best vantage point for monitoring what verification steps a company is or is not taking. Low-wage job seekers are the individuals most directly affected by the employment of undocumented aliens,²⁸⁷ and they may have independent incentives to invest in finding out whether avenues for employment are closed to them because of illegal practices.

Individuals from the community at large may also be better situated than public enforcers to detect whether employers are using illegal alien labor. Immigration status is often an open secret in ethnic communities, and local customers may be as well placed as anyone to recognize and confirm that employers are engaging in immigration violations. The threat of informants or qui tam suits may create higher tensions within communities. However, any approach that enlists private enforcers necessarily entails social costs, and the prospect of significant monetary gain may be the only way that individuals within communities would report this type of violation.

Providing incentives for informants to come forward to report on employer noncompliance may allow public enforcers to overcome information gaps, while preserving prosecutorial discretion in screening and pursuing cases. This approach raises many of the same benefits, costs, and risks as providing incentives for undocumented aliens to report on employers.

²⁸⁷ See Borjas, *Labor Demand*, *supra* note 276, at 1370.

Monetary compensation for informants may not raise as much of a potential furor as offering a reward of legalization for undocumented aliens. But payment for being a “snitch” may similarly open informants’ credibility to impeachment.²⁸⁸ Because informants do not need to bear the costs of public investigations, moral hazards exist that informants will levy frivolous accusations in hopes that public enforcers will come across evidence of employer noncompliance and result in a reward. To the extent that informants’ tips expose their identities, informants from within a firm or from the local community may also face threats of retaliation. Blown covers may require whistleblower protections in the case of gatekeeper employees and, in extreme cases of violent threats, may require spending for relocation, which may significantly add to the costs of paying informants.

The most troubling effect of using either private informants or qui tam litigants is the chilling effect the threat of reporting violations could have in the workplace and within ethnic communities. Incentives for private enforcers to monitor employers could fuel distrust between employees and employers, as well as among coworkers. Employers and employees would have incentives to engage in self-censorship for fear that their words could become bases for informant tips or qui tam suits from a disgruntled employee. Employers would also have incentives to engage in redundant oversight of their own compliance efforts to ensure that no employee is able to sabotage compliance and then report these “violations” for the sake of

²⁸⁸ See Richard C. Donnelly, *Judicial Control of Informants: Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1093 (1951) (discussing how informants “have been generally regarded with aversion and nauseous disdain”).

personal gain.²⁸⁹ These costs may be admittedly high, but the chilling effect on employing undocumented aliens would further the underlying purpose of the verification requirements.

The logic of rewarding individuals who come forward with information on employer violations that public enforcers may not otherwise be able to uncover is clear. In contrast, using qui tam suits to oversee employer compliance may be a more counterintuitive approach in this context. Undocumented aliens would likely disappear at the first sign of litigation, and much of the evidence of their employment could be concealed or destroyed before the start of a discovery process.²⁹⁰ Although the disappearance of witnesses could make prosecutions more difficult, the targets of this oversight are not the undocumented alien employees, but rather the employers to deter employment violations. Qui tam litigants would likely be insiders or secure the testimony of insiders in advance to ensure that sufficient evidence will exist for prosecutions.

The False Claims Act provides a well-developed model for a qui tam provision.²⁹¹ The key element of the False Claims Act framework is that it retains the potential for prosecutorial discretion. Qui tam litigants must disclose “substantially all material evidence and information” about the claims to the government at the time of filing a sealed complaint.²⁹² At the end of a sixty-day period, the government can choose to assume control of the case and award the litigants costs and attorney’s fees, as well as fifteen to twenty-five percent of the penalties imposed. If the government chooses not to assume control of the case, qui tam litigants will

²⁸⁹ The problem of sabotage would exist even if human resource personnel could not serve as informants or qui tam litigants. They may simply work through third parties inside or outside of the firm who could file valid tips of suits and then receive a kickback once the rewards were received.

²⁹⁰ A case in point is the failure of Operation Vanguard, a 1999 operation in which the then INS subpoenaed personnel records from Midwestern meatpacking plants and compared them against INS and Social Security databases. Of those workers called in for questioning, seventy percent disappeared rather than being interviewed. See Spencer S. Hsu & Kari Lydersen, *Illegal Hiring is Rarely Penalized*, WASH. POST, June 19, 2006.

²⁹¹ See 31 U.S.C. §§ 3729, 3730 (2000); see also *infra* Part II.B.2.

²⁹² See *id.* § 3730(b)(2)–(3).

receive twenty-five to thirty percent of the penalties, as well as litigation costs and attorney's fees, if they prevail.²⁹³ Use of some variant of this approach will allow public enforcers to intervene when significant policy or precedent issues are at stake.²⁹⁴ The particular percentages used in setting rewards under the False Claims Act may not be sufficient given the fact that the potential penalties for employment verification violations pale in comparison to government contracts fraud. However, the principle of setting upper and lower bounds on rewards levels is useful in making reward levels more predictable but also incorporating a measure of discretion to reflect the quality of qui tam litigants' efforts and information.

The responsiveness of both qui tam litigants and informants will turn on the level of compensation and the probability of compensation. There is no set formula for determining what sanction level for employers or what reward level for qui tam litigants or informants would provide appropriate incentives as it will depend on the probability of receiving a reward and the risk of retaliation. What is clear is that current penalties for employers, ranging from a warning to \$275 fines for initial violations up to \$11,000 for repeat offenders, are so low that they offer little deterrent value and little incentive for informants or qui tam litigants regardless of what percentage of the sanction serves as the reward.²⁹⁵

²⁹³ See *id.* § 3730(d)(2).

²⁹⁴ See Shavell, *supra* note 102, at 601–04 (discussing how the fact that private litigants do not usually take the deterrence value of trials into account may lead them to pursue socially excessive levels of trials or settlements in a given context). There may be instances where the public interest may call for a settlement rather than full prosecution of employment violations or the reverse. Additionally, there may be cases of such high stakes in terms of revenue or legal implications that the Bureau of Immigration and Customs Enforcement has a substantial interest in managing the case. If the federal government intervened too often, it could depress the rewards, and therefore dampen the incentives, for participation by qui tam litigants. However, the limited enforcement resources of the Bureau of Immigration and Customs Enforcement would likely allow qui tam litigants to act as litigants in the overwhelming majority of cases.

²⁹⁵ 8 C.F.R. § 274a.10(b)(1) (2005).

This article will propose a sliding scale of sanctions based on the size of the employer.²⁹⁶ The advantage of this approach is that it imposes sanctions that are roughly proportional to the deeper pockets of larger corporations, so that smaller corporations do not bear higher relative exposure to liability. The ceiling on penalties for gatekeeper violations would be \$15,000 per violation for employers of one to fifteen workers, \$25,000 per violation for employers of fifteen to one hundred employees, and \$50,000 per violation for employers of 101 to 200 workers, and potential fine levels could more gradually increase for firms with higher numbers of employees up to a cap of \$75,000 per violation.²⁹⁷ The floors for violations could be set at half the cap levels with a baseline of \$7500 per offense for employers of one to fifteen employees. Repeat offenders could face a sliding scale of increasing sanctions to attempt to deter violations.²⁹⁸

Determining what percentage of these fines would be sufficient to attract informants or quit tam litigants may be a matter of approximation at best. Given the sliding scale for businesses,²⁹⁹ it may make sense to offer rewards of fifty percent of the fines small-scale employers must pay and to gradually decrease this figure to twenty or twenty-five percent of fines for employers of over two hundred. This level of compensation will likely be more than adequate to attract a high

²⁹⁶ This proposal applies a modified version of the framework for compensatory awards in intentional discrimination cases brought under Title VII, which was laid out in the Civil Rights Act of 1991. *See* Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981 (2000)). A gatekeepers' failure to verify employer status is less reprehensible than intentional discrimination, and the proposed compensation framework reflects this fact by capping penalties at approximately half the amount of compensation used in the 1991 act.

²⁹⁷ *See id.* § 1981 a(b)(3) (creating a scale for damage awards based on the number of employees).

²⁹⁸ Recent Senate legislation has proposed a lower scale of sanctions for employment verification violations ranging from \$500 to \$4,000 per undocumented alien for initial employer offenders and \$4,000 to \$10,000 for repeat offenders. S. 2611, 109th Cong. § 274A(e)4(A). The Senate bill would also threaten potential criminal sanctions of up to three years of imprisonment (and/or a fine of \$20,000 per unauthorized alien) for employers "engag[ing] in a patter or practice of knowing violations," a far more draconian step. *Id.* at § 274A(f). Use of a criminal sanction for a civil offense may serve as a substitute sanction to deter otherwise judgment-proof employers who have flagrantly violated immigration law on many occasions, but without an effective way to oversee gatekeeper compliance this approach may serve as a symbolic, yet toothless threat.

²⁹⁹ *See id.*

level of private informant and qui tam participation. Thus, it would be better to err initially on the side of too small an incentive for qui tam suits to avoid the danger of overdeterrence. Then, if necessary, incentives could be raised to solicit higher levels of participation.³⁰⁰

Empowering qui tam litigants poses risks of abuse. Thus, safeguards are necessary to prevent overdeterrence and abuse of litigants' powers, and to reduce the social costs imposed by this approach. Inclusion of a "loser-pays" principle in the qui tam provision would help avoid the danger of frivolous lawsuits and the use of qui tam litigation for harassment purposes.³⁰¹ Without this provision, plaintiffs would have greater incentives to engage in highly speculative lawsuits or to go on fishing expeditions against targets with deep pockets in efforts to uncover unlawful practices.³⁰² However, having the loser pay the opposing side's legal fees would force prospective plaintiffs to take more of the full costs of suits into account. This provision would also mitigate concerns that corporations or their proxy entities would use qui tam suits to hurt competitors or that disgruntled employees would use this tool to harass employers.

The danger exists that private informants or qui tam litigants will sacrifice the state's interests for greater personal gain. Qui tam litigants may have incentives to blackmail employers or to agree to less than optimal settlements in exchange for kickbacks. In this way, they could either cut the government out of the compensation entirely or extract a higher percentage of

³⁰⁰ Over time, it may prove necessary to increase the percentage that private informants or qui tam litigants collect if participation in there is low participation. The False Claims Act offers a good example of the need to adjust fine levels over time. Its overhaul in 1986 resulted in the establishment of higher levels of rewards and a higher probability of compensation. This approach attracted many more qui tam litigants and became the poster child for successfully enlisting private actors. *See* Beck, *supra* note 123, at 561–63.

³⁰¹ *See* Brookins, *supra* note 135, at 51 n.250 (arguing that incorporation of a loser-pays principle may significantly reduce frivolous lawsuits).

³⁰² A loser-pays provision may decrease harassment suits and magnify incentives for those with valid claims. But the more uncertain it is that courts will be able to recognize valid claims as such, the more likely that a loser-pays principle may screen out valid claims and attract false claims based off of litigants' calculations of the expected value of gain or loss from suits. *See* Shavell, *supra* note 102, at 587–88.

rewards for themselves. Implementing fixed minimums for verification penalties or requirements that a court approve any settlement should mitigate some of the conflicts-of-interest issues concerning settlements.

Mitigating the risks of blackmail is more difficult. Existing laws applying criminal and civil sanctions to blackmail seek to deter this conduct.³⁰³ However, a blackmailer will have leverage to contract a settlement outside of the state's auspices if others are unlikely to discover the violations. This risk of blackmail may not be all bad inasmuch as it would still raise the costs for employing undocumented aliens and therefore have some deterrence value, even though it would take revenue away from the federal government.³⁰⁴ However, the risk of blackmail may not be very high in practice because of the nature of employment violations. In most cases, employers would have good reasons to believe that if one person knew about the fraud, then others would likely unearth it, making blackmail payoffs a poor investment and making a settlement with the government and future verification compliance a better option.

A related concern is that private informant or qui tam provisions may be exploited as money-making schemes by con artists. For example, immigrant smuggling rings could place undocumented aliens in jobs with fake documentation. The undocumented alien employees could then conveniently disappear at the same time that a third party filed a qui tam action against the employer. Related principal-agent problems could arise within a corporation. A human resources employee could be complicit in violations of the employer verification regime

³⁰³ See James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 670–73 (1984) (suggesting how blackmail may perversely further public enforcement objectives in some contexts).

³⁰⁴ See Jennifer G. Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935, 1943–49 (1993) (arguing that legalizing blackmail of criminals would actually deter crime).

and then become a private informant or qui tam litigant, or tip off a third party to do so and profit from violations she helped commit.

Clever con artists would make it extremely difficult to link a third-party informant with a scheme to frame employers. Because of the difficulties in detecting this type of fraud, one could impose high civil or criminal sanctions in attempts to deter this conduct.³⁰⁵ Blatant cases of entrapment could form a defense for employers, especially when there is evidence that an insider set them up, yet in most cases it would likely be impossible to prove the entrapment. Guarding against this risk of fraud admittedly will impose greater costs on businesses. However, this danger may ultimately play a positive role in providing employers with additional pressure actively to guard against the employment of undocumented aliens.

Another concern is the need to protect the whistleblowers. A private informant approach may allow the identities of informants to be kept completely secret depending upon whether the information they provide necessarily reveals their identity. However, qui tam litigants who are still employees of employers engaging in illegal practices would be putting their necks on the line. As in the case of other whistleblower statutes, employers should be barred from taking any retaliatory measures against employees engaged in qui tam suits or suspected as informants.³⁰⁶ Retaliation may assume many subtle forms, but providing employees broad protection with the full range of legal remedies that other whistleblower statutes provide should guard against this danger.³⁰⁷

³⁰⁵ See, e.g., 31 U.S.C. § 3730(d) (2000) (allowing courts to reduce the bounty to parties who “planned and initiated” the violation of the statute).

³⁰⁶ See, e.g., 18 U.S.C. §§ 1513(e), 1514A(a)(1)–(2) (2004) (laying out the whistleblower protections for the Sarbanes-Oxley Act of 2002).

³⁰⁷ See, e.g., 18 U.S.C. § 1514A(c) (2004) (providing employees who faced retaliation with “all relief necessary to make the employee whole,” including reinstatement, back pay, and special damages, such as litigation costs and reasonable attorney fees).

Lastly, public enforcers should be banned from using insider knowledge to file qui tam actions. Establishing a presumption that enforcement personnel and their close families are ineligible for qui tam actions would reduce the potential for conflicts of interest. Otherwise, enforcement personnel would have every incentive to look the other way on the job and then to file qui tam actions when off the job. Society would be worse off if had to pay enforcers both their salaries and qui tam proceeds to secure the same enforcement results.³⁰⁸ Similarly, an insider trading principle should limit parties from collecting anything more than their reasonably and actually incurred expenses if they knew or reasonably should have known that the information they acted upon came from an enforcement agency or officer's tip. Otherwise, public enforcers may have incentives not to act and to tip off third parties in exchange for kickbacks.

B. Filling the Need for a Swift, Accurate Means of Compliance

Creating a swift, accurate means of gatekeeper compliance is crucial for containing the costs that gatekeeper liability may impose on employers and prospective employees and mitigating incentives employers may have to discriminate against applicants of apparent foreign origin to mitigate potential liabilities. One significant challenge is that pervasive identity fraud and the widespread use of counterfeit documents threatens to compromise the accuracy of the

³⁰⁸ One alternative would be to incorporate rewards for detecting gatekeeper violations into the contracts of public enforcers. In theory, making part of a public enforcer's compensation contingent on enforcement outcomes could mitigate the risk of public enforcers "double dipping" to receive informant rewards. See Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD., 1, 1–3 (1974) (proposing that policemen be compensated based on the fines produced from their enforcement efforts). The problem is that there is a strong public aversion to linking the efforts of public enforcers to enforcement outcomes. Here there would also be a significant moral hazard that public enforcers would abuse their extensive enforcement powers and discretion to frame or extort gatekeepers for the sake of private gain.

verification process and make it easy for employers to turn a blind eye to fake documentation.³⁰⁹ For this reason, enhanced identification protections and access to information on immigration status must complement efforts to heighten incentives for employer compliance with their verification duties.

Recent legislative efforts have recognized the significance of this problem and focused on ways to combat document and identity fraud by attempting to create a more accurate system for verifying identity and immigration status. Both the Real I.D. Act of 2005 and proposed legislation on employer verification duties have sought to make the electronic verification of Social Security numbers a centerpiece of efforts to address document and identity fraud.³¹⁰ The Real I.D. Act seeks to make electronic confirmation of Social Security numbers and immigration status an integral part of state department of motor vehicle processes for granting and renewing driver's licenses.³¹¹ Proposed legislation in Congress seeks to extend this approach to the employer verification context by mandating that employers confirm Social Security numbers of employees against a similar electronic database.³¹² In conjunction with private oversight of employers, the combinations of these approaches would go far towards providing employers with both significant incentives to comply with their verification duty and a cost-effective and more accurate means for employers to fulfill their duty.

³⁰⁹ See Press Release, *Immigration and Naturalization Serv., INS Cracks National Counterfeit Documents Operation* (1998), available at http://www.rapidimmigration.com/www/news/news_124.html (documenting a single INS bust which led to the seizure of two million counterfeit resident alien cards, social security cards, and driver's licenses and noting that these IDs had a street value of a mere \$40 to \$200).

³¹⁰ See Real I.D. Act of 2005, Pub. L. No. 109-13, §§ 202–207, 119 Stat. 231 (2005); H.R. 4437, 109th Cong. §§ 701, 702 (2005); S. 2611, 109th Cong. §§ 274A(d), 274A(e) (2006).

³¹¹ See Real I.D. Act of 2005 §§ 202.

³¹² See, e.g., H.R. 4437, 109th Cong. §§ 701, 702 (2005); S. 2611, 109th Cong. §§ 274A(d), 274A(e) (2006).

1. Assessing the Impact of the Real I.D. Act of 2005

The need for a more secure identification system has been obvious since the inception of the employer verification regime.³¹³ Under the current system, undocumented aliens can easily secure and use fraudulent documentation to “confirm” their legality.³¹⁴ The Real I.D. Act of 2005 attempts to fill this gap by seeking to transform state driver’s licenses into a de facto national I.D. by May, 2008.³¹⁵ The Act prohibits federal agencies from accepting state driver’s licenses and personal identification cards unless these identification materials meet a set of conditions to counter identity and document fraud. State identity documents must incorporate uniform data and antifraud provisions based on a national standard and use a common machine-readable technology. States must also allow electronic access by all states to their databases, and state department of motor vehicles must verify the presented documents and the immigration status of applicants.³¹⁶ Specifically, the Act requires applicants to submit a photo I.D., documentation confirming birth date and present residence, a social security number, and documentation confirming legal status.³¹⁷ The Act also requires state departments of motor vehicles to electronically check applicants’ social security numbers and immigration status

³¹³ Others have argued that a national identification card or a functional equivalent is essential for the verification process to have any deterrence effect. See U.S. COMM’N ON IMMIGRATION REFORM, *supra* note 182, at 54–60; Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1003 (arguing “short of the erection of a two-thousand-mile wall along the United States-Mexican border and implementation of an effective national identification card system . . . exclusionary immigration policy will regulate the velocity of the labor flow but will never threaten the flow itself”). Most European countries, Hong Kong, Malaysia, Singapore, and Thailand use national identification cards. See, e.g., Mark Landler, *Fine-Tuning For Privacy, Hong Kong Plans Digital ID*, N.Y. TIMES, Feb. 18, 2002, at C1 (noting that Hong Kong has had a national identification card system for over fifty years).

³¹⁴ See *id.*

³¹⁵ See Real I.D. Act of 2005 §§ 202–207, Pub. L. No. 109-13 (2005).

³¹⁶ See *id.* § 202.

³¹⁷ See *id.* §§ 202(c)(1)–(2).

against the Social Security Administration and Systematic Alien Verification for Entitlements databases.³¹⁸

State driver's licenses already serve many of the purposes of a de facto national I.D. within the United States, and if successful, the Real I.D. Act's approach would help curb this form of document fraud. But it remains to be seen to what extent states are able and willing to comply with this massive unfunded mandate or whether the target date of 2008 is even remotely realistic.³¹⁹ The Congressional Budget Office estimated that compliance will cost states \$100 million over the next five years,³²⁰ but the National Conference of State Legislatures has estimated that it will cost between \$500 and \$750 million.³²¹ Additionally, the Act may only have a moderate impact in combating fraud because the federal government may be poorly positioned to oversee compliance by state departments of motor vehicles and states may lack sufficient incentives to comply with this federal mandate.

³¹⁸ See *id.* §§ 202(c)(3)(A), (c)(3)(C).

³¹⁹ See *id.* § 204 (granting the Department of Homeland Security authority to make grants to states to comply with the Act, but not appropriating any money for this purpose). The existence of minimum national standards and a national database for commercial driver's licenses suggests the potential viability of this initiative, although the Act poses challenges because of its more sweeping coverage. In 1986 Congress set minimum national standards for state commercial driver's licenses that required the inclusion of the name, address, social security number or equivalent, and physical description of the licensee. See Commercial Motor Vehicle Safety Act of 1986, Pub. L. No. 99-570, H.R. 5484, 99th Cong. § 12006 (Jan. 21, 1986). Congress authorized a private association, the American Association of Motor Vehicle Administrators, to create a database containing this information, as well as updated information on the dates and status of licenses that is accessible to states, commercial drivers, and prospective employers. See AM. ASS'N. OF MOTOR VEHICLES ADMIN., COMMERCIAL DRIVER LICENSE INFORMATION SYSTEM (CDLIS): DEFINITIONS AND FUNDAMENTAL REQUIREMENTS FOR COMPLIANCE 2-3 (1997), <http://www.aamva.org/Documents/drvCDLcompliancerequire.pdf>.

³²⁰ See U.S. CONG. BUDGET OFFICE, COST ESTIMATE, H.R. 418, REAL I.D. ACT OF 2005 1-2 (2005), available at <http://www.cbo.gov/showdoc.cfm?index=6072&sequence=0&from=6> (estimating that compliance with the Real ID Act would cost state and local governments \$100 million from 2005-2010 and would cost the federal government \$100 million during this period).

³²¹ See Ann E. Marimow, *Anti-Terror Legislation Expected to Lengthen DMV Lines*, WASH. POST, May 14, 2005, at B5.

The Real I.D. Act primarily addresses document fraud and will do little to address identity fraud. That horse is already out on the barn as fraudulent starter documents, such as birth certificates, are widely available and can be used to acquire social security numbers and licenses “legitimately.” This approach will not deal with this loophole, but it will raise the cost for prospective undocumented aliens to establish fraudulent identities. Criminal syndicates will have to go to more trouble and expense to compile the legitimate documents needed to acquire a driver’s license. Incorporating fingerprinting or biometric data for social security cards and birth certificates would narrow the opportunities for identity fraud by more clearly linking driver’s licenses to their holders,³²² but would also raise the cost of compliance and the political ire of those opposed to a national I.D.³²³ But regardless of this fact, the Real I.D. Act may create a more accurate common form of identification that could be used as the centerpiece of a more accurate verification system.

2. *The Potential for Electronic Verification*

Under the current system the lack of access to a database for employers to confirm the authenticity of identification documents significantly reduces the effectiveness of the verification process.³²⁴ The appeal of mandating that employers use an electronic database to verify and record employment eligibility is intuitive.³²⁵ If a highly accurate computer database existed,

³²² See Robert Pear, *Foreigners Obtain Social Security ID with Fake Papers*, N.Y. TIMES, May 20, 2002, at A12. Incorporating a fingerprint or biometric data would not be foolproof either, but it would make it harder to use duplicate identification documents and raise the cost of producing fraudulent identities.

³²³ It is noteworthy that even the proposed legislation to mandate access to a social security database for employment verification expressly disclaims any intent to create a national I.D. See H.R. 4437, 109th Cong. § 701(a)(H)(ii) (2005); S. 2611, 109th Cong. § 274A(c)(6) (2006).

³²⁴ See *supra* Part Section III.C.

³²⁵ The U.S. Commission on Immigration Reform noted the need for such a database over ten years ago, but to date the INS and its successor U.S. Citizenship and Immigration Services have experimented only with pilot programs of limited scope. See U.S. COMM’N ON IMMIGRATION REFORM, *supra* note 182, at 60. More recently, H.R. 4437 and S. 2611 have proposed that the Homeland Security Department and

then employers could confirm employment status with a click of a button at a quick speed and low cost.

Both the Real I.D. Act and proposed legislation on the verification process rely on electronic verification of Social Security numbers as a tool to make immigration status verification swift, cost-effective, and accurate.³²⁶ Past and current agency experiments suggest the viability of allowing uniform employer access to a computerized database of Social Security numbers and immigration status information.³²⁷ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 required the then-INS to initiate three pilot programs: a machine-readable document system, a citizen attestation program, and a Basic Pilot Program using an electronic database program.³²⁸ Although the first two programs were abandoned because of technical difficulties and concerns about accuracy and heightened discrimination, respectively,³²⁹ the Basic Pilot Program serves as a template for broader reform of document verification.³³⁰

Commissioner of Social Security make available an online or telephone-based database for employers to confirm the accuracy of job applicants' social security numbers, so that mandatory confirmation of social security numbers' accuracy can be incorporated into employers' verification obligations. H.R. 4437, 109th Cong. § 701 (2005); S. 2611, 109th Cong. § 274A(d) (2006).

³²⁶ See, e.g., H.R. 4437, 109th Cong. § 701 (2005); S. 2611, 109th Cong. § 274A(d) (2006).

³²⁷ The INS has experimented with a range of telephone-based and electronic verification initiatives. The first project was the Systematic Alien Verification for Entitlements (SAVE) program in 1986, a telephone-based database for government officials to confirm eligibility for public benefits. See Wendy Zimmermann, *The Save Program: An Early Assessment*, in *THE PAPER CURTAIN: EMPLOYER SANCTIONS' IMPLEMENTATION, IMPACT, AND REFORM* 129–55 (Michael Fix ed., 1991). Subsequent pilot programs in the 1990s used the SAVE database and other INS databases to explore the potential for telephone-based and electronic employment verification processes. See INST. FOR SURVEY RESEARCH & WESTAT, FINDINGS OF THE CITIZEN ATTESTATION VERIFICATION PILOT PROGRAM EVALUATION 14 (2003) [hereinafter CITIZEN ATTESTATION], available at <http://149.101.23.2/graphics/aboutus/repssstudies/piloteval/newpageforcavp.htm>.

³²⁸ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 401–04 (1996).

³²⁹ See CITIZEN ATTESTATION, *supra* note 327, at 35–43 (criticizing the citizen attestation verification program because of flaws with the database and the requirement that only noncitizens needed to provide electronic verification, raising concerns about illicit discrimination); INST. FOR SURVEY RESEARCH & WESTAT, FINDINGS OF THE MACHINE-READABLE DOCUMENT PILOT PROGRAM EVALUATION 85–86 (2003), available at <http://www.uscis.gov/graphics/aboutus/repssutides/piloteval/newpageformrdp.htm>

The Basic Pilot Program is currently a voluntary program that allows employers to check all prospective employees' social security numbers against an electronic Social Security Administration database.³³¹ If the validity of the number is not confirmed, then the data of noncitizens is electronically checked against a U.S. Citizenship and Immigration Services (USCIS) database.³³² If the number is still not confirmed, then USCIS status verifiers manually check other USCIS databases. Prospective employees may then file an appeal with the SSA or USCIS to contest the rejection of their employment eligibility, which the agencies must resolve within ten working days.³³³ If employees' data is not found in the databases after a manual check or employees do not file an appeal, then they are presumed to be unauthorized workers and can be terminated by their employers.³³⁴

The primary shortcomings of the Basic Pilot Program are the limited, voluntary participation by employers, the fact that it only addresses identity or document fraud in a limited way, and the fact that its efficacy relies on employer self-compliance without any credible threat of direct monitoring. Given that the program uses electronic databases, it would be virtually costless to allow uniform employer access to the SSA and USCIS databases, aside from the potential cost of employing more powerful servers. The main costs would be the need to hire

(finding that the pilot program of using machine-readable Iowa driver's licenses to verify immigration status failed because of technical and procedural problems); U.S. Citizenship and Immigration Services, Systematic Alien Verification for Entitlements Program Page, <http://uscis.gov/graphics/services/SAVE.htm> (last visited Apr. 14, 2005) (noting that these pilot programs were terminated in May and June, 2003, respectively).

³³⁰ See INST. FOR SURVEY RESEARCH & WESTAT, INS BASIC PILOT EVALUATION: SUMMARY REPORT 4–8 (2002), *available at* http://www.uscis.gov/graphics/aboutus/repstudies/piloteval/INSBASIC_summ.pdf (providing an overview of the features of the Basic Pilot Program).

³³¹ See INSTITUTE FOR SURVEY RESEARCH & WESTAT, FINDINGS OF THE BASIC PILOT PROGRAM EVALUATION 40–44 (2002) [hereinafter BASIC PILOT], *available at* http://www.uscis.gov/graphics/aboutus/repstudies/piloteval/C_II.pdf.

³³² *Id.* at 42.

³³³ *Id.* at 44.

³³⁴ *Id.*

dramatically more status verifiers to perform manual checks of immigration status, to handle appeals and to heighten the accuracy of the SSA and USCIS databases in order to reduce the need for manual checks.³³⁵ The former INS and current USCIS have managed telephone and electronic databases on immigration status for twenty years,³³⁶ which should give them a foundation to build on in making these databases more accurate if higher levels of funding were available.

The Basic Pilot Program places Social Security cards at the center of the employment status confirmation process,³³⁷ and a common theme of pending legislation for electronic verification is the use of Social Security Cards or state driver's licenses in the verification process.³³⁸ This focus on one or two means of identification confirmation represents a step of progress from the current system where a broad range of documents may be used to confirm immigration status.³³⁹ Mandating verification of social security numbers may mitigate risks that completely fraudulent social security numbers are being used. But one problem that neither the Real I.D. Act nor the Basic Pilot Program resolves is the fact that starter documents, such as birth certificates that are easily counterfeited, may be used to acquire lawful social security cards.³⁴⁰ While this fact

³³⁵ Currently, thirty-eight status verifiers manually verify immigration status for 2300 participating employers. See PRELIMINARY OBSERVATIONS, *supra* note 176, at 9–11.

³³⁶ See CITIZEN ATTESTATION, *supra* note 327, at 7–8.

³³⁷ See BASIC PILOT, *supra* note 327, at 35–36.

³³⁸ See, e.g., H.R. 4437, 109th Cong. § 702 (2005) (requiring electronic verification of social security numbers); S. 2611, 109th Cong. § 274A(c)(1) (2006) (requiring prospective employees to present a passport, driver's license, permanent residence card, or employment authorization card for electronic verification).

³³⁹ Job applicants currently can produce twenty-seven different types of documents to prove employment eligibility, and these documents include a range of identification documents that are either easily counterfeited, easy to obtain, or faceless and fungible, such as social security cards. See DEP'T OF HOMELAND SECURITY, EMPLOYMENT ELIGIBILITY VERIFICATION FORM I-9, at 3 (2005), *available at* <http://www.uscis.gov/graphics/formsfee/forms/files/i-9.pdf>.

³⁴⁰ See U.S. GEN. ACCOUNTING OFFICE, GAO-02-830T, IDENTITY FRAUD: PREVALENCE AND LINKS TO ALIEN ILLEGAL ACTIVITIES 6–7 (2002) (statement of Richard M. Stana) (noting that there are 8,000 state or local offices that issue birth certificates and other forms of identification that aliens can use as

means there would still be a significant loophole in the system, at minimum these reforms would make document and identity fraud more difficult and make it more costly for counterfeiters to sidestep the system's requirements.

If proposed legislation succeeds and all employers were required to participate in electronic verification under a variant of the Basic Pilot Program, errors could have much more far-reaching impact and delays in making manual checks or hearing appeals could harm the welfare of lawful workers.³⁴¹ Undocumented aliens who are conditionally rejected may well disappear once they receive a notice of non-confirmation for fear of being detected as such by the authorities. To minimize risks of frivolous claims clogging up an appeals system, appellants or their employers could be required to place a bond or money into an escrow account that would be forfeited if the appellant could not establish her work status eligibility.³⁴² To provide incentives for accurate data-keeping and swift processing of appeals, USCIS could be obligated to compensate legal workers a fixed per-diem sum or the opportunity cost of the temporary denial of employment if resolution of their work status lasted beyond a set time frame, such as

starter documents to prove their residence and identity); U.S. GEN. ACCOUNTING OFFICE, GAO-04-133T, COUNTERFEIT IDENTIFICATION RAISES HOMELAND SECURITY CONCERNS 1 (2003) [hereinafter COUNTERFEIT IDENTIFICATION] (statement of Ronald D. Malfi) (showing that social security certificates, birth certificates, and driver's licenses are easily forged and that this fraud is difficult to detect). Some legislative reforms have sought to address birth certificate fraud. *See, e.g.*, S. 1438, 109th Cong. § 312 (2006) (Bill Proposed by Texas Senator John Cornyn). But even the most effective system of electronic recording of birth certificates will have only prospective effect for future births and will not address the current problem of birth certificate fraud.

³⁴¹ *See, e.g.*, H.R. 4437, 109th Cong. §§ 701–702 (2005) (embracing the Basic Pilot Program's approach of having a ten-day period for a secondary check of Social Security numbers if they initially are not recognized); S. 2611, 109th Cong. § 274A(d)(8)(C) (also providing for a ten-day window for a secondary check of prospective employee information).

³⁴² The proposed Senate legislation prohibits employers from requiring prospective employees to post bonds or to indemnify the employer against potential liability arising from the employment verification requirements. S. 2611, 109th Cong. § 274A(h) (2006). However, the requirement that presumptive undocumented aliens or their employers post a bond to file an appeal would be a partial mirror image of a federal government obligation to compensate legal aliens or citizens for erroneous identifications.

the ten-day norm under the Basic Pilot Program.³⁴³ Employers would be prohibited from rescinding offers of employment during the appeal period, although employees could not begin work until appeals are successfully resolved.³⁴⁴

Offering uniform access to the Basic Pilot Program would equip good-faith employers with better tools to comply with their duties. However, absent effective oversight of employer compliance, policymakers may be stuck with many of the same failures as under the current system. Some shortcomings of the Basic Pilot Program could be easily overcome by mandating that multiple uses of the same social security card or other forms of prima facie document or identity fraud automatically trigger a red flag in the database.³⁴⁵ For example, USCIS could mitigate some of these dangers by imposing minimal recording requirements on employers, such as by having the electronic database automatically record the identity of job applicants and documents used when employers make inquiries, and employers could be required to record the dates of commencement and termination of employment into the database. Although many

³⁴³ See S. 2611, 109th Cong. §§ 274A(d)(10)(D), 274A(d)(11)(D) (2006) (proposing to compensate lost wages to workers whose employment is terminated because of an erroneous denial of employment); H.R. 4437, 109th Cong. § 701(7)(I) (2005) (authorizing Federal Tort Claims Act claims for dismissals based on an erroneous non-verification). Merely compensating for lost wages may understate the economic impact of erroneous denials of immigration status. See, e.g., Manns, *supra* note 103, at 1996–99 (laying out a framework for determining and administering an opportunity-cost-based compensation system). Determining the amount of compensation more accurately may depend on the consequence of a false positive identification. For example, individuals who are merely inconvenienced in waiting to clarify their legal status but ultimately receive the employment may have less of a claim than individuals who do not receive a job because an employer has cold feet. One way to minimize this problem is to mandate that employers check the immigration status of prospective employees only after they have made job offers official, with the proviso that employers may not withdraw job offers to a prospective employee until the affected individual has the chance to contest the database’s record of his or her immigration status.

³⁴⁴ The Senate bill incorporates a prohibition on termination until a final non-confirmation decision is issued. See S. 2611, 109th Cong. § 274A(d)(8)(D)(viii) (2006). Strengthening anti-discrimination protections could also help to guard against employers using more informal means of revoking offers to appellants. See *infra* Part IV.D.

³⁴⁵ See BASIC PILOT, *supra* note 331, at 27–29 (discussing the heightened incentives for identity fraud that the Basic Pilot program may create).

Americans have multiple jobs to make ends meet, listings of three or more contemporaneous jobs at once or jobs in different parts of the country could provide clear evidence that identity fraud is taking place. The database could automatically alert the Bureau of Immigration and Customs Enforcement and the Social Security Administration of *prima facie* cases of identification fraud, such as multiple uses of the same social security number, and trigger review of gatekeeper compliance or identity theft.³⁴⁶ Counterfeiters will undoubtedly try to adapt by engaging in more sophisticated types of identification fraud, such as by using easily counterfeited starter documents such as birth certificates to acquire legal social security numbers. But at a minimum this approach could significantly raise the costs for undocumented aliens of securing fake identification to satisfy the verification system's requirements.

A more significant challenge is that employers may respond to a more accurate employer verification system by sidestepping the system. Because of the current verification system's reliance on employer self-compliance, employers could simply choose not to use the databases, ignore the databases' negative responses, or tacitly or explicitly ask prospective employees to come up with other identity information to process into the system when there are doubts about the authenticity of identification materials. Employers might have incentives to serve merely as gatekeepers of their own self-interest in detecting potential violators, so that the information of undocumented aliens would not be processed into the verification system. So long as employers

³⁴⁶ Currently, the Bureau of Immigration and Customs Enforcement is denied access even to outcomes of database searches because of concerns that employers would not participate if they were exposed to a higher probability of oversight. Implementing automatic disclosures of multiple non-confirmations accords with the proposed House measure for automatic investigations if multiple attempts to confirm the same social security number signal potential fraud. *See* H.R. 4437, 109th Cong. § 701(F)(ii) (2005). By contrast, the Senate legislation would create a watered down disclosure regime which would allow disclosure to the Bureau of Immigration and Customs Enforcement of verification data only if a company has had 100 or more employees rejected over a three-year period or ten or more employees who attempt to use the same social security number. *See* S. 2611, 109th Cong. § 274A(e) (2006).

stand to gain from employing undocumented aliens and face a low risk of direct monitoring of noncompliance, they can be expected to continue to subvert their duties. For this reason making identification confirmation a swift and highly accurate process is only one step in strengthening the employer verification system. Combining this reform with private monitoring of gatekeeper compliance may give employers both better tools for compliance and a credible threat of oversight, so that they have less incentives either to evade compliance or to engage in discrimination against individuals of foreign origin to minimize their liability exposure.

C. Weighing the Costs and Benefits of a Heightened Duty Standard

Reducing document and identification fraud would make it easier for employers to verify employment status. However, an equally significant concern is the ease with which employers can formalistically satisfy their legal burdens while subverting the verification system in practice. The existing employer sanctions system imposes a knowledge mens rea requirement on employers, which makes it difficult for public enforcers to prove violations except in extreme cases.³⁴⁷ In fact, this standard perversely gives employers an incentive to “know” as little as possible about the legal status of prospective employees.³⁴⁸ Private monitors, such as undocumented aliens or other insiders, may be best placed to produce credible information

³⁴⁷ See *supra* Part III.C. The Senate has proposed only a minor shift to a standard of “knowing” or “reckless disregard” of an undocumented alien’s status. See S. 2611, 109th Cong. § 274A(1)(A) (2006), while House legislation provides for a good-faith defense for compliance with the electronic verification system’s requirements. See H.R. 4437, 109th Cong. §§ 701(a)(7)(J), 702(1)(B)(i) (2005); S. 1438, 109th Cong. § 732 (2005). The House’s good-faith defense may be sufficient in the context of public oversight alone, as enforcers may implicitly recognize that defense through nonenforcement even in the context of a strict liability regime. In the context of private oversight of gatekeepers, the considerations of over- or underdeterrence loom larger because private enforcers are likely to be motivated solely by profit motives and will be concerned solely about establishing liability.

³⁴⁸ Given the ease with which undocumented aliens can acquire fraudulent identification materials, this approach makes the verification process a “don’t ask, don’t tell” policy from the standpoint of employers. See MODEL PENAL CODE § 2.02(2)(b) (“A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exists.”).

regarding what employers knew about employment status and what compliance steps were taken. However, it may still be difficult and costly for private or public enforcers to prosecute cases concerning employer's knowledge because of the ability of firms to mount strong defenses concerning their knowledge and what compliance steps they took.

In contrast, the use of negligence or strict liability standards may offer significant advantages in both addressing concerns of underdeterrence and in making it easier for private enforcers to produce conclusive evidence of gatekeeper violations. If employment verification databases are highly accurate, then either standard would produce similar outcomes. But any database is bound to have significant limitations because of the easy access to fraudulent starter documents and the ability of aliens to engage in identity theft.³⁴⁹ Thus, the choice on which standard to use may turn on the degree of uncertainty about what constitutes good-faith compliance.³⁵⁰ Such uncertainty could raise the costs for businesses seeking to guard against potential liability. Ambiguity may also result in greater administrative costs from contested enforcement actions, based on claims that a reasonable investigation was conducted.

In contrast, imposing a strict liability requirement would provide enforcement officials with the lightest burden of proof for enforcement.³⁵¹ The vice and virtue of this approach would be the chilling effect this standard may have on both the employment of undocumented aliens and foreign-born citizens and legal aliens. A strict liability standard would draw a bright line between the hiring of undocumented aliens and the hiring of all other authorized workers. The approach would also underscore Congress's commitment to deter the hiring of undocumented aliens. However, use of this standard could result in punishing employers who acted in good

³⁴⁹ See COUNTERFEIT IDENTIFICATION, *supra* note 336, at 6 (showing that social security certificates, birth certificates, and driver's licenses are easily forged and that this fraud is difficult to detect).

³⁵⁰ See Kaplow & Shavell, *supra* note 68, at 10–14.

³⁵¹ See SHAVELL, *supra* note 66, at 5–17.

faith to uphold the verification procedures, resulting in social waste from residual liability and undermine popular support for enforcement. This danger is especially significant in the context of victim suits or qui tam litigation, because private parties are unlikely to exercise prosecutorial restraint in response to good-faith efforts at compliance in ways that public enforcers are more likely to do.³⁵² A strict liability standard may also have a greater chilling effect on the hiring of all foreign-born citizens and legal aliens due to employers' efforts to minimize potential liability.³⁵³

Either integrating safe harbor provisions into a strict liability regime or delineating what set of steps entail a full defense of good-faith compliance may offer the best approach to limit the dangers of overdeterrence.³⁵⁴ Employers could be required to (1) examine documents for authenticity and preserve a record of the identification materials for a minimum of three years after the termination of employment; (2) confirm these materials against an electronic database of social security and/or immigration status information; and (3) record the immigration status inquiry, the employment decision, and the date of the employment's termination in the immigration database.³⁵⁵ Requiring employers to perform this set of obligations would be a manageable burden, especially with access to SSA and USCIS databases under an extension of

³⁵² In most strict liability contexts public enforcement officials implicitly have discretion to decide what constitutes good faith compliance that should not be penalized and exercise that discretion through nonenforcement. See William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 CONTEMP. LEGAL ISSUES 1, 14–15 (1996) (discussing how, in practice, liability is almost always combined with a measure of discretionary enforcement as exemplified by overinclusive drug laws).

³⁵³ See *infra* Part IV.D.

³⁵⁴ For example, the Antitrust Division of the Department of Justice routinely issues enforcement guidelines that effectively create a safe harbor from enforcement. See, e.g., U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), available at <http://www.usdoj.gov/atr/public/guidelines/0558.htm>.

³⁵⁵ The current system requires employers merely to copy the identification materials for employees and to retain this information until one year after the duration of employment. See 8 U.S.C. § 1324a(b) (2000). Implementing a safe harbor provision along the lines described above would be consistent with the good-faith affirmative defense proposed in the House legislation. See H.R. 4437, 109th Cong. §§ 701(a)(7)(J), 702(1)(B)(i) (2005).

the Basic Pilot Program and heightened document and identity protections under the Real I.D. Act.

D. Balancing Sanctions with Concerns for Preemptive Discrimination

Another problem with the existing employer verification system is the low expected value of sanctions that employers face. The potential sanctions range from a warning to fines starting at \$275 for a first offense and rising to a maximum of \$11,000 for repeat employers of undocumented aliens.³⁵⁶ Even if private oversight dramatically increased enforcement, fines must also increase for the expected value of violations significantly to shape corporate hiring practices.³⁵⁷ One danger of heightened fines for employing undocumented aliens is that it may result in greater incentives for discrimination against citizens and legal aliens who appear to be of foreign origin. Thus, greater enforcement should be coupled with heightened antidiscrimination protections for legal aliens and citizens of foreign origin.

Data from the initial implementation of the employer verification system in 1986 supports the need for strengthening antidiscrimination provisions. During the first two years following the enactment of gatekeeper liability, employers appear to have anticipated higher levels of enforcement against employing undocumented aliens and have responded by significantly heightening discrimination against individuals of foreign origin regardless of employment

³⁵⁶ Sanctions range from \$275 to \$2000 per alien for first-time employer offenders; \$2000 to \$5000 per alien for second-time offenders; and \$3000 to \$11,000 per alien for employers who have committed violations on numerous occasions. *See* 8 U.S.C. § 1324a(e)(4) (2000); 8 C.F.R. §§ 274a.10(b)(1)(ii)(A)–(C) (2005) (adjusted for inflation). Additional penalties of \$110 to \$1100 apply for violations of verification paperwork requirements. *See* 8 U.S.C. § 1324a(e)(5) (2000).

³⁵⁷ The expected value of sanctions must increase such that it raises the aggregate costs of employing undocumented aliens to levels higher than employing legal aliens or citizens. This level is challenging to determine because the wage gap and value employers place on employing undocumented aliens over their legal counterparts may vary significantly by skill, industry, and geography.

status.³⁵⁸ After 1988, employers appear to have recognized that public enforcers were poorly positioned to oversee employer compliance and that few enforcement actions were taking place.³⁵⁹ As a result, there was little incentive for preemptive discrimination against individuals of apparent foreign origin, and discrimination appears to have declined commensurately.³⁶⁰

To the extent that more effective oversight of employers succeeds in heightening enforcement levels, the danger of preemptive discrimination against legal aliens and citizens of apparent foreign origin will also increase. Existing antidiscrimination laws exclude legal aliens from protection who are not “actively pursuing” naturalization,³⁶¹ and antidiscrimination laws do not apply to employers of three or less employees.³⁶² Although the federal government should provide incentives for the active pursuit of naturalization, making the application of

³⁵⁸ See, e.g., Cynthia Bansak & Stephen Raphael, *Immigration Reform and the Earnings of Latino Workers: Do Employer Sanctions Cause Discrimination?*, 54 INDUS. & LAB. REL. REV. 275, 276–80 (2001) (discussing the potential increase in employment discrimination against legal aliens who appeared to be of foreign origin from 1986 to 1988); U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 23 (1990); TASK FORCE ON IRCA-RELATED DISCRIMINATION, U.S. DEPT. OF JUSTICE, REPORT AND RECOMMENDATION OF THE TASK FORCE ON IRCA-RELATED DISCRIMINATION 25 (1990) (noting that the employer sanctions regime creates “a greater incentive to comply with the sanctions provisions than with the anti-discrimination provisions”).

³⁵⁹ See Medina, *supra* note 11, at 689–90 (arguing that declines in illegal immigration and the employment of undocumented aliens from 1986 to 1988 were largely attributable to the large-scale legalization of existing aliens in 1986, rather than the efficacy of the employer verification system).

³⁶⁰ See, e.g., Katharine M. Donato & Douglas S. Massey, *Effect of the Immigration Reform and Control Act on the Wages of Mexican Migrants*, 74 SOC. SCI. Q. 523, 534–36 (1993) (finding that the employer sanctions regime had not had a lasting effect of heightened discrimination against legal aliens of foreign origin). However, empirical studies may not fully capture the impact of employer sanctions in encouraging discrimination based on foreign origin because such discrimination is hard to prove.

³⁶¹ See Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b(a)(3)(B) (2000). The antidiscrimination provisions extend protection to discrimination based on citizenship status for citizens or legal aliens who demonstrate the intent to naturalize. See 8 U.S.C. § 1324b(a)(1)–(3). Legal aliens who do not apply for naturalization within six months of eligibility are not protected, nor are undocumented aliens who do not receive naturalization after two years, unless they are “actively pursuing” naturalization. See 8 U.S.C. § 1324b(a)(3)(B). Additionally, this provision exempts firms that privilege citizen applicants over their equally qualified legal alien counterparts and government contractors who discriminate based on citizenship status because of state orders to do so. See 8 U.S.C. § 1324b(a)(4); 8 U.S.C. § 1324b(a)(2)(C).

³⁶² See 8 U.S.C. § 1324b(a)(2)(A).

antidiscrimination laws turn on this fact appears to be arbitrary and misguided. Similarly, policing employment decisions of small-scale employers may pose the most difficult challenges, but legal applicants of foreign origin should receive protection in this context as well.

Admittedly, these loopholes are modest, but a more significant weakness of current antidiscrimination protections is that the default response for employment discrimination against legal aliens or citizens based on national origin or citizenship status is the issuance of cease and desist orders.³⁶³ Administrative judges also have discretion to add a modest range of financial sanctions up to a maximum \$10,000.³⁶⁴ In a world of moribund enforcement against the employment of undocumented aliens, these protections may have been adequate, but in a world of heightened enforcement they may be far too weak to overcome the incentives to discriminate against legal aliens.

Ideally, policymakers should attempt to have the expected value of sanctions for hiring undocumented aliens approximate the expected value of sanctions for discriminating against legal citizens and aliens of apparent foreign origin. This approach would seek to place employers in a position where discriminating against individuals of apparent origin does not appear to be a cost-effective strategy for limiting liability exposure under the verification regime. Although this goal sounds simple, it may prove difficult to make the expected value from both violations approximate each other because the probabilities of enforcement may be different.

The problem is that it would likely prove far harder to establish intentional discrimination based on apparent foreign origin than to show violations of the verification requirements. But how much harder it would be to establish intentional discrimination than gatekeeper noncompliance is an open question that may be hard to pin down, especially before reforms are

³⁶³ See 8 U.S.C. § 1324b(g)(2)(A).

³⁶⁴ See 8 U.S.C. § 1324b(g)(2)(B); 8 U.S.C. § 1324a(e)(4)(A); 8 U.S.C. § 1324a(e)(5).

implemented. For this reason it may make sense to impose significantly higher sanctions for intentional discrimination than for verification violations, but to set broad ranges to allow judges to account for the need to impose stiffer penalties if preemptive discrimination occurs much more frequently.

Application of the compensation levels for intentional discrimination laid out in the Civil Rights Act of 1991 would lead to sanctions that roughly double this article's proposed penalty levels for verification violations.³⁶⁵ Firms with fifteen to a hundred employees face a cap of \$50,000 per violation, employers of 101 to 200 face a cap of \$100,000, employers of 201 to 500 face a cap of \$200,000, and a maximum of \$300,000 for employers of over 500.³⁶⁶ The minimum compensation for intentional discrimination could be set at half of these levels, which would provide significant discretion for judges in setting penalties. There is nothing special about these particular compensation levels, but the fact that they are used in other intentional discrimination contexts makes them form a useful benchmark.

If empirical data suggests that preemptive discrimination increases significantly in the wake of a reform of the verification system, then allowing an adjustment to higher compensation levels for employment discrimination may be appropriate. Setting sanctions levels is admittedly an imprecise science at best, but this approach would represent progress both in creating more credible deterrence through higher sanctions and a proximate symmetry of incentives.

³⁶⁵ See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 2 and 42 U.S.C.).

³⁶⁶ See *id.* § 102(b)(3). These proposed compensation ranges are dramatically higher than the mild compensation for discrimination against legal aliens which Senate legislation has proposed, *see* S. 2611, 109th Cong. § 305 (2006). (In contrast, the House legislation did not recognize the need to strengthen anti-discrimination provisions at all.). The higher compensation levels in this proposal reflect the very real risk that companies may respond to a significantly higher threat of prosecution by private monitors by engaging in sweeping discrimination against individuals of perceived foreign origin.

V. CONCLUSION

This article has shown how the enlistment of private monitors may allow public enforcers to overcome limits in their ability to oversee gatekeepers. Private monitors may provide public enforcers with cost-effective access to information on wrongdoing and enforcement resources to address gatekeeper contexts where the nature and scale of both the wrongdoing and compliance measures would otherwise be difficult to detect or confirm. Victim suits, incentives for primary wrongdoers to report on gatekeeper violations, rewards for informants from the community, and the enlistment of *qui tam* litigants present distinct costs, risks, and tradeoffs. But in narrowly defined contexts, each of these tools may offer politically plausible and economically feasible ways to enhance gatekeeper compliance with their duties.

The case study on immigration enforcement has shown how the enlistment of private monitors may provide employer gatekeepers with significantly heightened incentives to comply with their verification duties. Offering undocumented aliens the reward of legalization to inform on their employers may seem to be a counterintuitive strategy, but this approach has the potential of dividing the interests of employers and undocumented aliens and producing incentives for employer compliance. Enlisting private actors, such as competitors, employees, job seekers and other members of the community, as informants and *qui tam* litigants may provide other ways to gain insider information on noncompliance and to heighten enforcement levels. Although this approach poses costs and risks, this article has shown how it is possible to equip employers to fulfill their obligations in a cost-effective, accurate way and how to mitigate concerns of overdeterrence through the design of duty standards and the adoption of antidiscrimination protections. The challenges of overseeing employer gatekeepers in the immigration context are both stark and distinctive, but this approach may serve as a blueprint for thinking about how

private monitors may oversee similar challenges facing the oversight of gatekeepers in other contexts.